

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

NO. 109

MARGARET E. SNYDER, Also Known as
PEG SNYDER, Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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**DOCKET ENTRIES IN UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
MISSOURI.**

1966

- Nov. 23 Complaint filed. Summons issued directed to (3) Defendants returnable within 20 days after service.
- Dec. 6 Marshal's return on summons filed. Defendant National Western Life Insurance Company ex. 11/30/66.
- Dec. 16 Motion of Defendant, National Western Life Ins. Co., to dismiss filed.
- Dec. 20 Designation of local counsel filed by Benjamin E. Pickering of Newman and Pickering, Attorneys at Law, Dallas, Texas. Consent to act as local counsel filed by F. William McCalpin of Lewis, Rice, Tucker, Allen & Chubb, 1555 Railway Ex. Building, 611 Olive Street, St. Louis, Mo.
- Dec. 29 Marshal's return on summons filed. Dft. Charles Harris ex. 12/17/66.
- Marshal's return on summons filed. Dft. Earl W. Kirchhoff, ex. 12/20/66.

1967

- Jan. 6 By leave of Court and on application of defendants, Charles Harris and Earl W. Kirchhoff, defendants granted to and including January 26, 1967, within which to file motions or to plead to Plaintiff's complaint in memo. filed. (RWH,

J.) Morris A. Shenker, Attorney at Law, St. Louis, Mo., attorney for defendants.

- Jan. 13 Submission of motion to dismiss of defendant, National Life Insurance Company vacated and said motion docketed for hearing in St. Louis on next regular motion docket of Court 1.
- Jan. 25 Separate motions of defendants, Earl W. Kirchhoff and Charles Harris to dismiss, filed. Oral argument requested.
- Feb. 3 Motion of Defendant, National Western Life Ins. Co., to dismiss argued and submitted. Motions (2) of Defendants, Harris and Kirchhoff to dismiss are passed to next motion Docket (RWH J.)
- Feb. 24 Order filed. Separate motion of Defendant, National Western Life Insurance Company for failure to state cause of action is sustained and Plaintiff granted 20 days to file amended pleadings as to said Defendant. That part of the motion seeking to quash the return of service is sustained and the service is quashed. Copy of order mailed to Hyman G. Stein, F. Wm. McCalpin and Benjamin E. Pickering.
- Mar. 14 Amendment complaint filed.
- Mar. 22 Transcript of proceedings held Feb. 3, 1967, filed by Official Court Reporter Olive Poole. Transcript retained in St. Louis, Missouri.
- Mar. 27 Motion of Defendants, Earl W. Kirchhoff and Charles Harris to dismiss amended complaint filed. Supporting brief filed.
- Mar. 29 By leave, Plaintiff granted to April 5, 1967 to file reply memo.

Apr. 5 Plaintiff's memo. in opposition to Defendants' motion to dismiss filed.

Apr. 7 Separate motions of Defendants Harris and Kerchhoff to dismiss, are argued and submitted.

Cause set for trial in Capé Girardeau, Mo., Monday, May 15, 1967.

Apr. 13 Cause dismissed without prejudice as to Defendant, National Western Life Insurance Company, in order filed.

Apr. 25 Copy of Notice to take depositions of Defendants filed.

Apr. 26 Copy of Notice to take deposition of Charles Harris and Earl W. Kirchhoff, filed.

Apr. 27 Memo. opinion and order sustaining Defendants' motion to dismiss and dismissing cause without prejudice filed. Attest—copy of order mailed to Stein and Siegel, Attorneys at Law, International Building, 722 Chestnut St., St. Louis, Mo., and Morris A. Shenker, Attorney at Law, 408 Olive Street, St. Louis, Mo. (Harper, J.)

May 25 Plaintiff's Notice of Appeal to the United States Court of Appeals for the Eighth Circuit filed.

Attested copy of Notice of Appeal mailed to Morris A. Shenker, Attorney at Law, 408 Olive St., St. Louis, Mo. Appeal bond in the sum of \$250.00 filed.

**DOCKET ENTRIES IN THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT.**

Date **Filings—Proceedings.**

1967

June 9 Docketing case.
June 9 Certified copies of Notice of Appeal and of
 Docket Entries in U. S. District Court.
June 9 Appearance for appellant.
June 9 Copy record for printing.
June 13 Appearance for appellees.
June 23 Record printed and filed; preparing record for
 printer.
June 27 Appearance for appellant.
June 29 Receipted statement of cost of printing record.
July 19 Brief appellant.
July 25 Appearance for appellees.
Aug. 10 Brief appellee.
Aug. 21 Reply Brief appellant.
Dec. 13 Transfer to calendar for Jan. 1968 session.

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Jan. 19 Argued by Mr. Hyman G. Stein for appellant
 and Mr. James L. Zemelman for appellee.

Submitted to Judges Van Oosterhout, Matthes
and Harris.

- Jan. 19 Appearance for appellees.
- Feb. 27 Opinion, Per Curiam.
- Feb. 27 Judgment: Affirmed.
- Mar. 14 Petition for Rehearing, or in alternative Transfer to Court en banc.
- Mar. 22 Order: Petition appellant for rehearing or in alternative transfer to court en banc-denied.
- Mar. 27 Motion appellant for stay of issuance of mandate.
- Mar. 27 Order: Issuance of mandate stayed to and including May 1, 1968, on motion.
- Apr. 25 Motion appellant for further stay of mandate.
- Apr. 25 Order: Issuance of mandate further stayed to and including May 20, 1968, pending proceedings in Supreme Court, U. S. re writ of certiorari, etc., on motion appellant.
- May 7 Prepare transcript for Supreme Court, U. S.
- May 27 Evidence of docketing of case in Supreme Court.
- Oct. 24 Order of Supreme Court, U. S., allowing certiorari.

RECORD.

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT.**

No. 18,881.

CIVIL.

**MARGARET E. SNYDER, ALSO KNOWN AS
PEG SNYDER,
APPELLANT,**

vs.

**CHARLES HARRIS AND EARL W. KIRCHHOFF,
APPELLEES.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI.**

**In the United States District Court,
Eastern District of Missouri,
Southeastern Division.**

**Margaret E. Snyder, also known as
Peg Snyder, Plaintiff,**

vs.

**Charles Harris (Cape Girardeau, Mis-
souri),**

**Earl W. Kirchhoff (Cape Girardeau,
Missouri),**

and

**National Western Life Insurance
Company, a corporation,**

Defendants.

**Cause No.
S66C78.**

COMPLAINT.

(Filed in U. S. District Court on Nov. 23, 1966.)

Plaintiff states that:

**1. At all times herein mentioned Plaintiff was and is a
resident and citizen of the State of Arizona.**

2. Defendant Charles Harris is a resident and citizen of the State of Missouri and more particularly resides in the City of Cape Girardeau, Missouri.

3. Defendant Earl W. Kirchhoff is a resident and citizen of the State of Missouri and more particularly resides in the City of Cape Girardeau, Missouri.

4. Defendant National Western Life Insurance Company (hereinafter sometimes called and referred to as "National Western") is a corporation organized and existing under the laws of the State of Colorado.

5. Missouri Fidelity/Union Trust Life Insurance Company (hereinafter sometimes called and referred to as "Missouri Fidelity") at the times herein mentioned was and is a corporation and engaged in the business of selling life insurance and issuing and selling policies of life insurance.

6. The amount involved in controversy herein is in excess of Ten Thousand Dollars (\$10,000.00) exclusive of cost and interest and there is a diversity of citizenship between Plaintiff and the Defendants and this Court accordingly has jurisdiction of this cause.

7. At all times herein mentioned and for a long time prior to November 22, 1966, Plaintiff was and still is a shareholder of and in Missouri Fidelity and the owner of two thousand (2,000) shares of said Missouri Fidelity.

8. The By-laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen (15) directors.

9. At the times herein mentioned and complained of Defendants Charles Harris and Earl W. Kirchhoff were each a director of Missouri Fidelity.

10. At the times herein mentioned and complained of the market price of Missouri Fidelity was about \$2.63 per share.

11. Sometime prior to November 22, 1966, Defendant National Western submitted to directors of Missouri Fidelity a proposal to purchase from them for \$7.00 per share all the shares of Missouri Fidelity owned by them, conditioned, however, that all directors of Missouri Fidelity except four of their number resign as such directors and that five nominees of Defendant National Western be elected as directors of Missouri Fidelity and that such nominees be designated and named as a majority of the executive committee and of the investment committee of Missouri Fidelity.

12. On or about November 22, 1966, Defendant National Western pursuant to its said offer entered into an agreement with eight of the directors of Missouri Fidelity included among whom were Defendants Charles Harris and Earl W. Kirchhoff to pay to them and to friends and relatives of theirs \$7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors including Defendants Charles Harris and Earl W. Kirchhoff did resign as directors of Missouri Fidelity. Four of the directors of Missouri Fidelity did not participate towards the effectuation of the acts aforesaid and did not resign and three directors who also did not participate in the effectuation of the aforesaid acts did resign.

13. The aforesaid transactions and acts and resignations occurred at and as a part of a meeting of the Board of Directors of Missouri Fidelity with Defendants Charles Harris and Earl W. Kirchhoff participating therein and with Defendant National Western by and through its agents and representatives participating therein in the County of St. Louis, Missouri, and at such meeting of directors and as such resignations were tendered five nominees of Defendant National Western were elected directors in lieu of the resigning directors.

14. The aforesaid conduct and acts of said eight directors including Defendants Charles Harris and Earl W. Kirchhoff who agreed to sell their shares and who resigned as aforesaid were a breach of trust and a violation of their duties as directors of Missouri Fidelity and Defendant National Western wrongfully and in violation of the rights of Plaintiff and other shareholders of Missouri Fidelity similarly situated, procured said resignations and therefor paid or has agreed to pay the said eight directors who resigned, including Defendants Charles Harris and Earl W. Kirchhoff and their friends and relatives as aforesaid a premium of about \$1,200,000.

15. The aggregate amount paid by Defendant National Western for said shares purchased by it as aforesaid was approximately \$1,200,000 in excess of the market value of said shares and was a premium paid by it to said selling shareholders for the resignations of said directors who resigned as aforesaid and for the obtaining control of the executive committee and investment committee of Missouri Fidelity by Defendant National Western as aforesaid. The conduct of Defendant National Western hereinabove set forth was the commission by it of a tort in the State of Missouri and more particularly in St. Louis County, Missouri.

16. Upon information and belief Plaintiff states that the class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states and it would not be practical for all of them to join or be joined in this action and Plaintiff brings this action on behalf of herself and all other shareholders of Missouri Fidelity similarly situated.

17. By reason of the matters aforesaid and the wrongful conduct of Defendant National Western and the eight directors who participated therein as aforesaid the said premium of approximately \$1,200,000 should be distributed to Plaintiff and the other shareholders of Missouri

Fidelity similarly situated according to the shares held by them.

Wherefore, Plaintiff prays judgment against the Defendants in the amount of \$1,200,000 and that such judgment be entered in favor of Plaintiff and the other shareholders of Missouri Fidelity in accordance with the shares of Missouri Fidelity held by them respectively and for costs herein.

HYMAN G. STEIN,
CHARLES ALAN SEIGEL,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri 63101,
Telephone: Central 1-3443,
Attorneys for Plaintiff.

**DEFENDANT CHARLES HARRIS SEPARATE
MOTION TO DISMISS.**

Oral Argument Requested.

(Filed in U. S. District Court on January 25, 1967.)

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action on the ground that it purports to constitute a derivative shareholders action pursuant to the provisions of Rule 23.1 of the Federal Rules of Civil Procedure and does not comply with the provisions of said rule in that;

(a) The complaint is not verified.

(b) The complaint fails to set forth that the action is not a collusive one to confer jurisdiction on a Court of the United States which it would not otherwise have.

(c) The complaint fails to allege with particularity the efforts, if any, made by the plaintiff to obtain the action she desires from the directors or other comparable authority.

(d) The complaint fails to allege with particularity the reasons for her failure to obtain the action or for not making the effort.

MORRIS A. SHENKER,
Attorney for Defendant Charles
Harris,
408 Olive Street,
St. Louis, Missouri,
CH. 1-6116.

A copy of the foregoing Motion to Dismiss mailed to Hyman G. Stein and Charles Alan Seigel, Attorneys for Plaintiff, 1117 International Bldg., 722 Chestnut Street, St. Louis 1, Missouri this 25 day of Jan., 1967.

JAMES L. ZEMELMAN.

**DEFENDANT EARL W. KIRCHOFF SEPARATE
MOTION TO DISMISS.**

Oral Argument Requested.

(Filed in U. S. District Court on Jan. 25, 1967.)

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action on the ground that it purports to constitute a derivative shareholders action pursuant to the provisions of Rule 23.1 of the Federal Rules of Civil Procedure and does not comply with the provisions of said rule in that;

(a) The complaint is not verified.

(b) The complaint fails to set forth that the action is not collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

(c) The complaint fails to allege with particularity the efforts, if any, made by the plaintiff to obtain the action she desires from the directors or other comparable authority.

(d) The complaint fails to allege with particularity the reasons for her failure to obtain the action or for not making the effort.

MORRIS A. SHENKER,
Attorney for Defendant,
Earl W. Kirchhoff,
408 Olive Street,
St. Louis 2, Missouri,
CH. 1-6116.

A copy of the foregoing Motion to Dismiss mailed to Hyman G. Stein and Charles Alan Seigel, Attorneys for Plaintiff, 1117 International Bldg., 722 Chestnut Street, St. Louis 1, Missouri, this 25 day of Jan., 1967.

JAMES L. ZEMELMAN.

SUPPLEMENTAL MOTION TO DISMISS OF DEFENDANTS EARL W. KIRCHHOFF AND CHARLES HARRIS.

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(Filed in U. S. District Court on February 28, 1967.)

The defendants incorporate by reference their motions heretofore filed and move the Court as to the following supplemental grounds as follows:

1. To dismiss the action because the complaint fails to join as defendants the other six directors referred to in paragraph twelve of the complaint, which directors are indispensable parties under Rule 19 of the Federal Rules of Civil Procedure and are not within the jurisdiction of the Court, and further because the plaintiff has failed to set forth the names of the persons referred to in paragraph twelve of the complaint and the reasons they were not joined, contrary to the provisions of Rule 19 (c) of the Federal Rules of Civil Procedure.

2. To dismiss the action as one pleading a class action, if so for the reasons that:

(a) The person on whose behalf the action purports to be brought do not constitute a class, but on the contrary the interest of many of them are distinct and adverse.

(b) The plaintiff does not adequately represent all the other members of the alleged class, in that the interest of the plaintiff is not identical or co-extensive with the interests of other members of the alleged class, but are different therefrom and adverse thereto, and that certain other members of the alleged class have rights not possessed by the plaintiff.

(c) The claims of the plaintiff are not typical of the claims of all of the members of the alleged class.

MORRIS A. SHENKER,
Attorney for Defendants,
408 Olive Street,
St. Louis 2, Missouri,
CHestnut 1-6116.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

Margaret E. Snyder, Also Known as
Peg Snyder,

Plaintiff,

vs.

Charles Harris and Earl W. Kirchhoff,
Defendants.

Cause No.
S66 C78.

AMENDED COMPLAINT.

(Filed in U. S. District Court on Mar. 14, 1967.)

Plaintiff states that:

1. At all times herein mentioned Plaintiff was and is a resident and citizen of the State of Arizona.

2. Defendant Charles Harris is a resident and citizen of the State of Missouri and more particularly resides in the City of Cape Girardeau, Missouri.

3. Defendant Earl W. Kirchhoff is a resident and citizen of the State of Missouri and more particularly resides in the City of Cape Girardeau, Missouri.

4. National Western Life Insurance Company (hereinafter sometimes called and referred to as "National Western") is a corporation organized and existing under the laws of the State of Colorado.

5. Missouri Fidelity/Union Trust Life Insurance Company (hereinafter sometimes called and referred to as "Missouri Fidelity") at the times herein mentioned was and is a corporation and engaged in the business of selling life insurance and issuing and selling policies of life insurance.

6. The amount involved in controversy herein is in excess of Ten Thousand Dollars (\$10,000.00) exclusive of cost and interest and there is a diversity of citizenship between Plaintiff and the Defendants and this Court accordingly has jurisdiction of this cause.

7. At all times herein mentioned and for a long time prior to November 22, 1966, Plaintiff was and still is a shareholder of and in Missouri Fidelity and the owner of two thousand (2,000) shares of said Missouri Fidelity.

8. The By-Laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen (15) directors.

9. At the times herein mentioned and complained of Defendants Charles Harris and Earl W. Kirchhoff were each a director of Missouri Fidelity.

10. At the times herein mentioned and complained of the market price of Missouri Fidelity was about \$2.63 per share.

11. Sometime prior to November 22, 1966, National Western submitted to directors of Missouri Fidelity a proposal to purchase from them for \$7.00 per share all the shares of Missouri Fidelity owned by them, conditioned however, that all directors of Missouri Fidelity except four of their number resign as such directors and that five nominees of National Western be elected as directors of Missouri Fidelity and that such nominees be designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity.

12. On or about November 22, 1966, National Western pursuant to its said offer entered into an agreement with eight of the directors of Missouri Fidelity included among whom were Defendant Charles Harris and Earl W. Kirchhoff to pay to them and to friends and relatives of theirs \$7.00 per share for an aggregate of approximately 300,000

shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors including Defendants Charles Harris and Earl W. Kirchhoff did resign as directors of Missouri Fidelity and nominees of National Western were designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity. Four of the directors of Missouri Fidelity did not participate towards the effectuation of the acts aforesaid and did not resign and three directors, who also did not participate in the effectuation of the aforesaid acts did resign.

13. The aforesaid transactions and acts and resignations occurred at and as a part of a meeting of the Board of Directors of Missouri Fidelity with Defendants Charles Harris and Earl W. Kirchhoff participating therein and with National Western by and through its agents and representatives participating therein in the County of St. Louis, Missouri, and at such meeting of directors and as such resignations were tendered five nominees of National Western were elected directors in lieu of the resigning directors.

14. The aforesaid conduct and acts of said eight directors including Defendants Charles Harris and Earl W. Kirchhoff who agreed to sell their shares and who resigned as aforesaid were a breach of trust and a violation of their duties as directors of Missouri Fidelity and National Western procured said resignations and therefor paid or has agreed to pay the said eight directors who resigned, including Defendants Charles Harris and Earl W. Kirchhoff and their friends and relatives as aforesaid a premium of about \$1,200,000.

15. The aggregate amount paid by National Western for said shares purchased by it as aforesaid was approximately \$1,200,000 in excess of the market value of

said shares and was a premium paid by it to said selling shareholders for the resignations of said directors who resigned as aforesaid and for the obtaining control of the executive committee and investment committee of Missouri Fidelity by National Western as aforesaid.

16. Upon information and belief Plaintiff states that the class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states, and the class is so numerous that it would be impractical for all of the members of the said class to join or be joined in this action, and Plaintiff brings this action on behalf of herself and all other shareholders of Missouri Fidelity similarly situated, and Plaintiff can and will adequately and fairly represent and protect the interest of the said class of shareholders of Missouri Fidelity.

The questions of law or fact herein are common to the said class, and the claims of Plaintiff herein are typical of the claims of the said class of shareholders of Missouri Fidelity.

The prosecution of separate actions by individual members of the said class would create a risk of inconsistent or varying adjudications with respect to individual members of the said class which would establish incompatible standards of conduct for the parties opposing the said class, namely, the Defendants herein.

The prosecution of separate actions by or against individual members of the said class would create a risk of adjudications with respect to individual members of the said class which would as a practical matter be dispositive of the interests of the other members of the said class not parties to the adjudications or subsequently impair or impede their ability to protect their interests.

17. By reason of the matters aforesaid and the wrongful conduct of the eight directors who participated therein

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as aforesaid the said premiums of approximately \$1,200,000 should be distributed to Plaintiff and the other shareholders of Missouri Fidelity similarly situated according to the shares held by them.

Wherefore, Plaintiff prays judgment as follows:

1. That the Court enter its Order determining that a class action shall be maintained herein.

2. That the Court enter judgment in favor of the Plaintiff and against the Defendants in the amount of \$1,200,000, and that such judgment be entered in favor of Plaintiff and other shareholders of Missouri Fidelity in accordance with the shares of Missouri Fidelity held by them respectively, and that Plaintiff be allowed her reasonable attorneys fees and costs herein, and that the Court's judgment include and describe those whom the Court finds to be members of the class.

HYMAN G. STEIN,
CHARLES ALAN SEIGEL,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri 63101,
Telephone: CEntral 1-3443,
Attorneys for the Plaintiff.

Copy of the foregoing Amended Complaint mailed this 14th day of March, 1967, to Morris A. Shenker and Bernard Mellman, attorneys for Defendants, 408 Olive Street, St. Louis, Missouri 63102.

CHARLES ALAN SEIGEL.

**MOTION OF DEFENDANTS EARL W. KIRCHHOFF
AND CHARLES HARRIS TO DISMISS
THE AMENDED COMPLAINT.**

Oral Argument Requested.

(Filed in U. S. District Court on Mar. 27, 1967.)

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action on the ground that it purports to constitute a derivative shareholders action pursuant to the provisions of Rule 23.1 of the Federal Rules of Civil Procedure and does not comply with the provisions of said rule in that:

(a) The complaint is not verified.

(b) The complaint fails to set forth that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

(c) The complaint fails to allege with particularity the efforts, if any, made by the plaintiff to obtain the action she desires from the directors or other comparable authority.

(d) The complaint fails to allege with particularity the reasons for her failure to obtain the action or for not making the effort.

3. To dismiss the action because the complaint fails to join as defendants the other six directors referred to in paragraph twelve of the complaint, which directors are indispensable parties under Rule 19 of the Federal Rules of Civil Procedure and are not within the jurisdiction of

the Court, and further because the plaintiff has failed to set forth the names of the persons referred to in paragraph twelve of the complaint and the reasons they were not joined, contrary to the provisions of Rule 19 (c) of the Federal Rules of Civil Procedure.

4. To dismiss the action as one pleading a class action, if so for the reasons that:

(a) The person on whose behalf the action purports to be brought do not constitute a class, but on the contrary the interest of many of them are distinct and adverse.

(b) The plaintiff does not adequately represent all the other members of the alleged class, in that the interest of the plaintiff is not identical or co-extensive with the interests of other members of the alleged class, but are different therefrom and adverse thereto, and that certain other members of the alleged class have rights not possessed by the plaintiff.

(c) The claims of the plaintiff are not typical of the claims of all of the members of the alleged class.

5. To dismiss the action on the ground that the Court lacks jurisdiction as the amount in controversy is less than \$10,000.00.

MORRIS A. SHENKER,
Attorney for Defendants,
408 Olive Street,
St. Louis 2, Missouri,
CH 1-6116.

A copy of the foregoing Motion to Dismiss and Memo mailed to Hyman G. Stein & Charles A. Seigel, Attorneys for Plaintiff, 722 Chestnut Street, St. Louis 1, Mo., this 24 day of March, 1967.

J. L. ZEMELMAN.

In the United States District Court,
Eastern District of Missouri,
Southeastern Division.

Margaret E. Snyder, also known
as Peg Snyder,

Plaintiff,

vs.

Charles Harris and Earl W.
Kirchhoff,

Defendants.

No. S 66 C 78.

Harper, Judge.

MEMORANDUM OPINION AND ORDER.

(Filed in U. S. District Court on April 27, 1967.)

This matter is before the court on the joint motion of the defendants to dismiss the amended complaint. The motion has been submitted on the briefs of the parties and oral argument.

The plaintiff seeks to bring this action as a class action pursuant to Rule 23, Federal Rules of Civil Procedure, as amended July, 1966. The relevant part of the amended complaint alleges that the plaintiff, Margaret E. Snyder, is a citizen of the State of Arizona, and the defendants, Charles Harris and Earl W. Kirchhoff, are citizens of the State of Missouri; that there is diversity of citizenship and the amount in controversy exceeds \$10,000.00; that since prior to November 22, 1966, the plaintiff has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (hereinafter referred to as Missouri Fidelity) and owns two thousand shares of said company; that the By-laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen directors and that the defendants were at all times relevant to this action mem-

bers of said board of directors; that at all times relevant to this action the market price of Missouri Fidelity was about \$2.63 per share; that sometime prior to November 22, 1966, National Western Life Insurance Company (hereinafter referred to as National Western) submitted to the directors of Missouri Fidelity a proposal to purchase from them for \$7.00 per share all of the shares of Missouri Fidelity owned by them, conditioned however, that all directors of Missouri Fidelity, except four, resign as directors and that five nominees of National Western be elected as directors of Missouri Fidelity, and that such nominees be designated and elected as a majority of the executive committee and of the investment committee of Missouri Fidelity; that on or about November 22, 1966, National Western, pursuant to its said offer, entered into an agreement with eight of the directors of Missouri Fidelity, including the defendants herein, to pay to them and to friends and relatives of theirs \$7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors, including the defendants herein, did resign as directors of Missouri Fidelity, and nominees of National Western were designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity; that the afore-said conduct and acts of the said eight directors, including the defendants, were a breach of trust and a violation of their duties as directors of Missouri Fidelity, and National Western procured said resignations and therefore paid or has agreed to pay the said eight directors who resigned, including the defendants herein, and their friends and relatives, a premium of about \$1,200,000.00; and that the aggregate amount paid by National Western for the said shares was approximately \$1,200,000.00 in excess of the market value of said shares and was a

premium paid by it to the said selling shareholders for the resignations of said directors who resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity:

The amended complaint prays for judgment in the amount of \$1,200,000.00, said judgment to be entered in favor of the plaintiff and the other individual shareholders (allegedly over 4,000 in number) according to their respective share holdings.

The present motion alleges various grounds for dismissal of the amended complaint, including lack of jurisdictional amount. For reasons hereinafter set forth, this court need only consider the question of lack of jurisdictional amount.

The defendants contend that if the plaintiff has pleaded a class action, she has pleaded a "spurious" class action and that the jurisdictional amount in such an action may not be determined by aggregating the amounts which might be claimed by others in the class action. Further, the defendants contend that the plaintiff's individual claim can amount to no more than \$8,740.00. The plaintiff, on the other hand, contends that since "spurious" class actions no longer exist under Rule 23, F. R. C. P., as amended July, 1966, and since a judgment in any class action is now binding upon the entire class, the claims of the entire class are in controversy and should, therefore, be aggregated in arriving at the jurisdictional amount.

The law concerning the aggregation of claims in a class suit before the amendment in July, 1966, to Rule 23, F. R. C. P., is fairly stated in Moore's Federal Practice, § 23.13, p. 3480, to-wit:

"In the case of joinder of plaintiffs the matter of aggregation of claims is ruled by the doctrine of

Pinel v. Pinel (240 U. S. 594, 60 L. Ed. 817). There the rule was laid down that if the demands of the plaintiffs are 'separate and distinct', each must have a claim in the jurisdictional amount, while if they unite to enforce a joint or common interest aggregating is permissible. These principles apply with equal force in the class action, since the class action is but a procedural device to permit some to prosecute or defend an action without the necessity of all appearing as plaintiffs or defendants. Thus in the case of a true class action, if instead of bringing a class action the members of the class joined as plaintiffs, the jurisdictional amount would be determined by the joint or common claim; no one has a several claim. Unless the class suit were utilized all of the members of the class would have to join. Normally this is impracticable, and the class action device is employed; but the jurisdictional amount is determined in precisely the same manner, and aggregation is proper. In the hybrid and spurious class suit, on the other hand, the rights are several and there can be no aggregation, whether the parties all join or the class action is resorted to."

The so-called "spurious" class action under the old Rule 23 was where the character of the right sought to be enforced for or against the class was several, and there was a common question of law or fact affecting the several rights and a common relief was sought (See old Rule 23 (a) (3)). Any judgment in the spurious class action was binding solely on the named parties; it was in reality an invitation to join. By its very definition, the character of the rights sought to be enforced in a spurious class action were "separate and distinct," and, therefore, under the doctrine of *Pinel v. Pinel*, supra, such rights could not be aggregated to make up the jurisdictional amount.

Rule 23, as amended July, 1966, makes no provision for a spurious type of class action, and makes no reference to a "joint" or a "common" interest. The complaint alleges a breach of trust, and in paraphrasing the language of Rule 23 (b) (1), F. R. C. P., there is apparently an attempt to bring this action under such rule. However, since the prayer seeks direct individual damages for the respective shareholders of Missouri Fidelity, this action is more analogous to those situations contemplated by Rule 23 (b) (3), F. R. C. P. (See Notes of Advisory Committee on Rules following 28 USCA, Rule 23, as amended July, 1966.)

Rule 23 (b) (3), F. R. C. P., as amended July, 1966, provides, in part, to-wit:

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) . . .

"(2) . . .

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular form; (D) the difficulties likely to be encountered in the management of a class action."

A judgment in a class action brought under Rule 23, as amended, is *res judicata* as to the whole class except as to those members of a (b) (3) type of class action who specifically request to be left out of the action.

Because a judgment in a class action is now binding upon the entire class, and because spurious class actions no longer exist under the amended Rule 23, does it necessarily follow that the doctrine with respect to jurisdictional amount of *Pinel v. Pinel*, *supra*, no longer applies to class actions? This court thinks not.

Pinel v. Pinel, *supra*, specifically states, l. c. 60 L. Ed. 818, in part, to-wit:

"The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount" (Cases cited).

The *Pinel* doctrine applied with equal force to class actions brought under Rule 23 which was but a procedural device to allow several plaintiffs to unite in a single suit.

Rule 23, as amended, contains nothing to indicate that it has now become something more than a procedural device to permit several plaintiffs to unite in a single suit. The rule in no way purports to affect the jurisdiction of this court, nor do the Notes of the Advisory Committee on Rules indicate that the rule is to have such an effect. There is no reason why the *Pinel* doctrine should suddenly become obsolete with the passage of the amended Rule 23, unless the new rule somehow changes the character of a plaintiff's right. That it does not is clearly shown by the following excerpt from the Notes of the

Advisory Committee on Rules (see p. 62 of notes following 28 USCA, rule 23, as amended July, 1966), to-wit:

“Subdivision (c) (2) makes special provision for class actions maintained under sub-division (b) (3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b) (3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.”

Furthermore, a construal of the amended Rule 23 in such a way as to confer jurisdiction on this court where in a similar situation before the amendment to the rule it would not have had jurisdiction, would constitute a direct violation of Rule 82, F. R. C. P., as amended, which states, in part:

“These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.”

See also *DeLorenzo v. Federal Deposit Insurance Corp.*, 259 F. Supp. 193, l. c. 195, note 5.

The sole question before this court, then, is whether or not the demands of the plaintiff are separate and distinct from other persons in the class. If they are, then under the Pinel doctrine the plaintiff may not aggregate such claims with those of others in the class.

The allegations of the plaintiff's complaint clearly indicate that her claims are separate and distinct. The com-

plaint alleges that the plaintiff is the owner of 2,000 shares of stock of Missouri Fidelity; that the market price of said stock at the time of the matters complained of was approximately \$2.63 per share; and that the defendants received \$7.00 per share for their stock. The prayer asks for damages in the amount of \$1,200,000.00; to be divided among the individual shareholders in accordance with their respective share holdings. Thus, the plaintiff is alleging that she is entitled to \$8,740.00 damages for her own stock.

For the foregoing reasons the court finds that the amount in controversy in the present action does not exceed \$10,000.00, and this court, therefore, lacks jurisdiction over the controversy. The defendants' joint motion to dismiss is sustained, and said cause is dismissed without prejudice.

ROY W. HARPER,
U. S. District Judge.

NOTICE OF APPEAL.

(Filed in U. S. District Court on May 25, 1967.)

Notice is hereby given that Plaintiff herewith appeals to the United States Court of Appeals for the Eighth Circuit from the Order of the United States District Court dated April 27, 1967 sustaining the joint motion of the Defendants to dismiss and dismissing Plaintiff's cause without prejudice.

HYMAN G. STEIN,
CHARLES ALAN SEIGEL,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri 63101,
Telephone: CEntral 3-3443,
Attorneys for the Plaintiff.

OPINION.

United States Court of Appeals
For the Eighth Circuit.

No. 18,881.

Margaret E. Snyder, Also Known
as Peg Snyder,

Appellant,

v.

Charles Harris and Earl W. Kirch-
hoff,

Appellees.

Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

[February 27, 1968.]

Before Van Oosterhout, Chief Judge; Matthes, Circuit
Judge, and Harris, District Judge.

Per Curiam.

Plaintiff, appellant herein, filed this class action pur-
suant to amended Rule 23, Fed. R. Civ. P., effective July
1, 1966.

Upon motion of the defendants the district court, Honor-
able Roy W. Harper, Chief Judge, dismissed the action
on the ground that the damages claimed by appellant, ex-
clusive of interest and costs, did not exceed the \$10,000.00
jurisdictional amount requisite for diversity jurisdiction
under 28 U. S. C., § 1332. *Snyder v. Harris*; 268 F. Supp.
701 (E. D. Mo. 1967).

The pertinent allegations of the complaint are fully incorporated in Judge Harper's opinion and need not be restated here.

The sole question for determination is whether amended Rule 23 allows the plaintiff in a class action to aggregate her claim with those of other class members whom she represents for purposes of satisfying the jurisdictional amount under Section 1332.

Appellant cites no authority in support of her position, except the suggestion of Professor Charles Alan Wright in 2 Barron & Holtzoff, Federal Practice and Procedure, § 569 (Supp. 1967, at 106) that it would be convenient to hold that since a judgment rendered in a class action is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy and therefore should be aggregated to satisfy the jurisdictional amount. We are not persuaded from our study of amended Rule 23 and the Advisory Committee notes to conclude that the amendment of the Rule was designed to or did in fact change the substantive law proscribing the aggregation of separate and distinct claims in a class action for purposes of conferring jurisdiction under Section 1332.

On the basis of the district court's soundly reasoned opinion and the opinion of the Fifth Circuit in *Alvarez v. Pan American Life Insurance Company*, 375 F. 2d 992 (5th Cir. 1967), *cert denied*, 389 U. S. 827 (1967), we affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

(Filed February 27, 1968.)

United States Court of Appeals
For the Eighth Circuit.

No. 18,881.

September Term, 1967

Margaret E. Snyder, also known
as Peg Snyder,

Appellant,

vs.

Charles Harris and Earl W.
Kirchhoff.

} Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court sustaining Motions of Defendants to dismiss and dismissing this cause without prejudice, be, and the same is hereby, affirmed.

February 27, 1968.

Order entered in accordance with Per Curiam Opinion:

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

In the
United States Court of Appeals
For the Eighth Circuit.

No. 18,881.

Civil.

In the Matter of
Margaret E. Snyder, Also Known as Peg Snyder,
Appellant,

vs.

Charles Harris and Earl W. Kirchhoff,
Appellees.

Appeal From the United States District Court for the
Eastern District of Missouri.

PETITION

**For Rehearing, or, in the Alternative, to
Transfer to the Court En Banc.**

(Filed March 14, 1968.)

Now comes the above named Appellant in the above entitled cause and respectfully presents and files this, her Petition for Rehearing, or, in the Alternative, to Transfer to the Court en banc, and as grounds and reasons therefor, and in support thereof, respectfully states that:

1. This cause was argued before this Honorable Court on January 19, 1968 and the decision and opinion of this Court herein was rendered and entered on February 27, 1968.

2. On February 23, 1968, in the case of *The Gas Service Company v. Coburn, etc.*, not yet reported in the Federal Reporter and which was reported in the March 5, 1968 issue of *The United States Law Week* and which did not come to the attention of Appellant or her attorneys until after such publication, the United States Court of Appeals for the Tenth Circuit rendered a decision which is pertinent in this case on a controlling matter of law as hereinafter more fully stated. Inasmuch as *The Gas Service Company v. Coburn* was decided only four days before the decision of this Court herein and has not been reported in the Federal Reporter and the decision of this Honorable Court herein was rendered prior to the reporting of *The Gas Service Company v. Coburn* in the March 5, 1968 issue of *The United States Law Week*, Appellant respectfully suggests and states that said decision of the United States Court of Appeals for the Tenth Circuit was overlooked by this Honorable Court or had not come to this Court's attention at the time of its decision herein.

3. In its Opinion and decision rendered herein on February 27, 1968 this Honorable Court affirmed the decision of the United States District Court in dismissing this action for lack of satisfying the jurisdictional amount under Section 1332, U. S. C., holding that the Plaintiff (Appellant) could not under Amended Rule 23 aggregate her claim with the claims of other class members.

4. In its Opinion herein this Honorable Court stated, *inter alia*:

"Appellant cites no authority in support of her position, except the suggestion of Professor Charles Alan Wright in 2 *Barron & Holtzoff*, Federal Practice and Procedure, Sec. 569 (Supp. 1967 at 106), that it would be convenient to hold that since a judgment rendered in a class action is binding under the amended rule on the entire class, the claims for or against the

whole class are in controversy and therefore should be aggregated to satisfy the jurisdictional amount.

.

“On the basis of the district court’s soundly reasoned opinion and the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 827 (1967), we affirm.”

5. In **The Gas Service Company v. Coburn**, supra, the United States Court of Appeals for the Tenth Circuit expressly held that even though the claims of the individuals constituting the class in the case there presented were neither “joint” nor “common” yet under Rule 23, Fed. R. Civ. P., as amended in July 1966, the claims of the entire class were in controversy and could be aggregated for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332. With respect to the decision of the United States Court of Appeals for the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992, relied on by this Honorable Court in the instant case, the Tenth Circuit stated: “We must respectfully disagree . . .”.

A copy of the United States Court of Appeals for the Tenth Circuit of **The Gas Service Company v. Coburn Opinion**, is set forth in full in the Appendix hereto.

6. For the reasons hereinabove set forth Appellant respectfully states that this Honorable Court has overlooked a controlling matter of law and fact as set forth in the decision of the United States Court of Appeals for the Tenth Circuit in **The Gas Service Company v. Coburn**, supra.

7. The question and issue herein involved is of great importance in the administration of justice and is a matter of great importance with respect to the interpretation

and application of Rule 23 of the Federal Rules of Civil Procedure as amended in July 1966.

Wherefore, for the reasons stated above, Appellant respectfully requests and petitions that a rehearing be granted herein or, in the alternative, that this matter be transferred to the Court En Banc, and that on such rehearing or transfer, the judgment and order of the United States District Court be reversed.

Respectfully submitted,

/s/ HYMAN G. STEIN,

/s/ CHARLES ALAN SEIGEL,

HYMAN G. STEIN,

CHARLES ALAN SEIGEL,

722 Chestnut Street,

St. Louis, Missouri 63101,

Attorneys for Appellant.

Certificate of Counsel.

Hyman G. Stein and Charles Alan Seigel, attorneys for the above named Appellant, hereby certify that they have read and are familiar with and understand the contents of the above and foregoing Petition for Rehearing, Or In The Alternative, To Transfer To The Court En Banc, and that said Petition is submitted in good faith and is believed by them to be meritorious and said Petition is not presented for the purpose of delay or vexation.

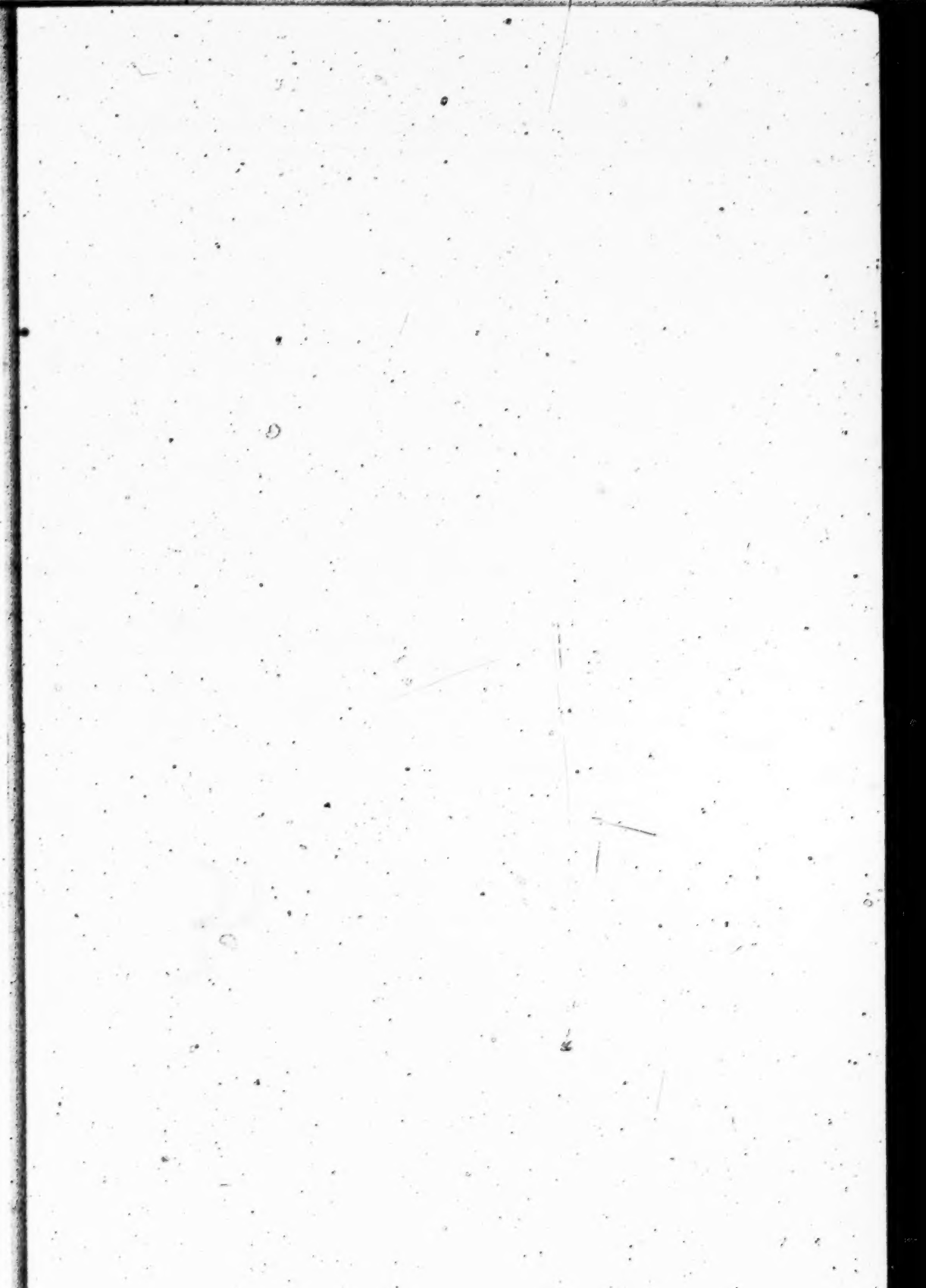
/s/ Hyman G. Stein,

/s/ Charles Alan Seigel,

Hyman G. Stein,

Charles Alan Seigel,

Attorneys for Appellant.



APPENDIX.

United States Court of Appeals,
Tenth Circuit.

January Term, 1968.

The Gas Service Company,

Appellant,

v.

Otto R. Coburn, on behalf of himself
and all others similarly situated,
Appellee.

No. 9635.

Appeal from the United States District Court
for the District of Kansas.

Gerit H. Wormhoudt (Robert L. Coleman, Kirke W.
Dale and Paul R. Kitch were with him on the brief)
for Appellant.

William V. Crank (D. Arthur Walker, Richard E. Cook,
George B. Collins, Robert Martin, K. W. Pringle, Jr.,
W. F. Schell, Robert M. Collins, W. L. Oliver, Jr.,
Tom C. Triplett, Thomas M. Burns and Peter J.
Wall were with him on the brief) for Appellee.

Before Woodbury*, Lewis and Hickey, Circuit Judges.

Lewis, Circuit Judge.

This is an interlocutory appeal authorized in compli-
ance with 28 U. S. C., § 1292 (b), to allow appellate com-

* Of the First Circuit, sitting by designation.

sideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption outside the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding \$10,000, and that such individual claims are variable in amount¹ but would aggregate to more than \$10,000.

The trial court found, and it seems indisputable, that plaintiff's action definitely meets each prerequisite to a

¹ By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was \$7.81.

class action as presently set out in Rule 23(a) and one or more of the additional requirements of 23(b).² The class is numerous, a single question of law is presented com-

² The amended Rule 23 provides in part:

“(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the

mon to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment³ would not have been classified as a "true" class action and aggregation of claims would not have been permitted. **See** *Aetna Ins. Co. v. Chicago, Rock Island & Pac. R. R.*, 10 Cir., 229 F. (2) 584; *The Fifth Circuit in Alvarez v. Pan American Life Ins. Co.*, 375 F. (2) 992, has held that this result is still dictated after adoption of the new rule. Citing Clark

desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

³ The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

v. Paul Gray, Inc., 306 U. S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,⁴ the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F. (2) at 995. We must respectfully disagree.

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In *Gibbs v. Buck*, 307 U. S. 66, 72, the Supreme Court stated it thus:

"... federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.⁵ The Advisory Com-

⁴ "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

⁵ *Clark v. Paul Gray, Inc.*, 306 U. S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

mittee's Note, 39 F. R. D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true", "hybrid", and "spurious". "In practice", said the Committee, "the terms 'joint', 'common', etc., which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true", "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in *Provident Bank v. Patterson*, U. S., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensable parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under **any** circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, *Gibbs v. Buck*, *supra*, and it follows, under the new rule that when a cause clearly falls within its

terms as a class action, as here, the claims of the entire class are in controversy.⁶

The judgment is affirmed and the cause remanded for further proceedings.

ORDER.

United States Court of Appeals
for the Eighth Circuit.

No. 18881

Margaret E. Snyder, also known as Peg Snyder,
Appellant,

vs.

Charles Harris and Earl W. Kirchoff.

Appeal from the United States District Court for the
Eastern District of Missouri.

Petition of appellant for rehearing or in the alternative transfer to the Court en banc in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 22, 1968.

⁶ Professor Wright considers this to be a realistic view. He states:

"The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."

ORDER.

United States Court of Appeals
for the Eighth Circuit.

No. 18881

Margaret E. Snyder, also known as Peg Snyder,
Appellant,

vs.

Charles Harris and Earl W. Kirchoff.

Appeal from the United States District Court for the
Eastern District of Missouri.

On consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed to and including May 1, 1968. If within this period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 27, 1968.

ORDER.

United States Court of Appeals
for the Eighth Circuit.

No. 18881

Margaret E. Snyder, etc.,
Appellant,

vs.

Charles Harris, et al.

Appeal from the United States District Court for the
Eastern District of Missouri.

On consideration of the motion of appellant for a further stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed to and including May 20, 1968. If within this period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the further stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 25, 1968.

Supreme Court of the United States.

October Term, 1968.

No. 109.

Margaret E. Snyder,
Petitioner,

v.

Charles Harris and Earl Kirchhoff.

ORDER ALLOWING CERTIORARI.

(Filed October 21, 1968.)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

A true copy.

Test:

John F. Davis,
Clerk of the Supreme Court of the United States,
By B. P. Cullen, Chief Deputy.

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Office: Supreme Court, U.S.
FILED

NOV 29 1968

JOHN F. DAVIS, CLERK

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 117

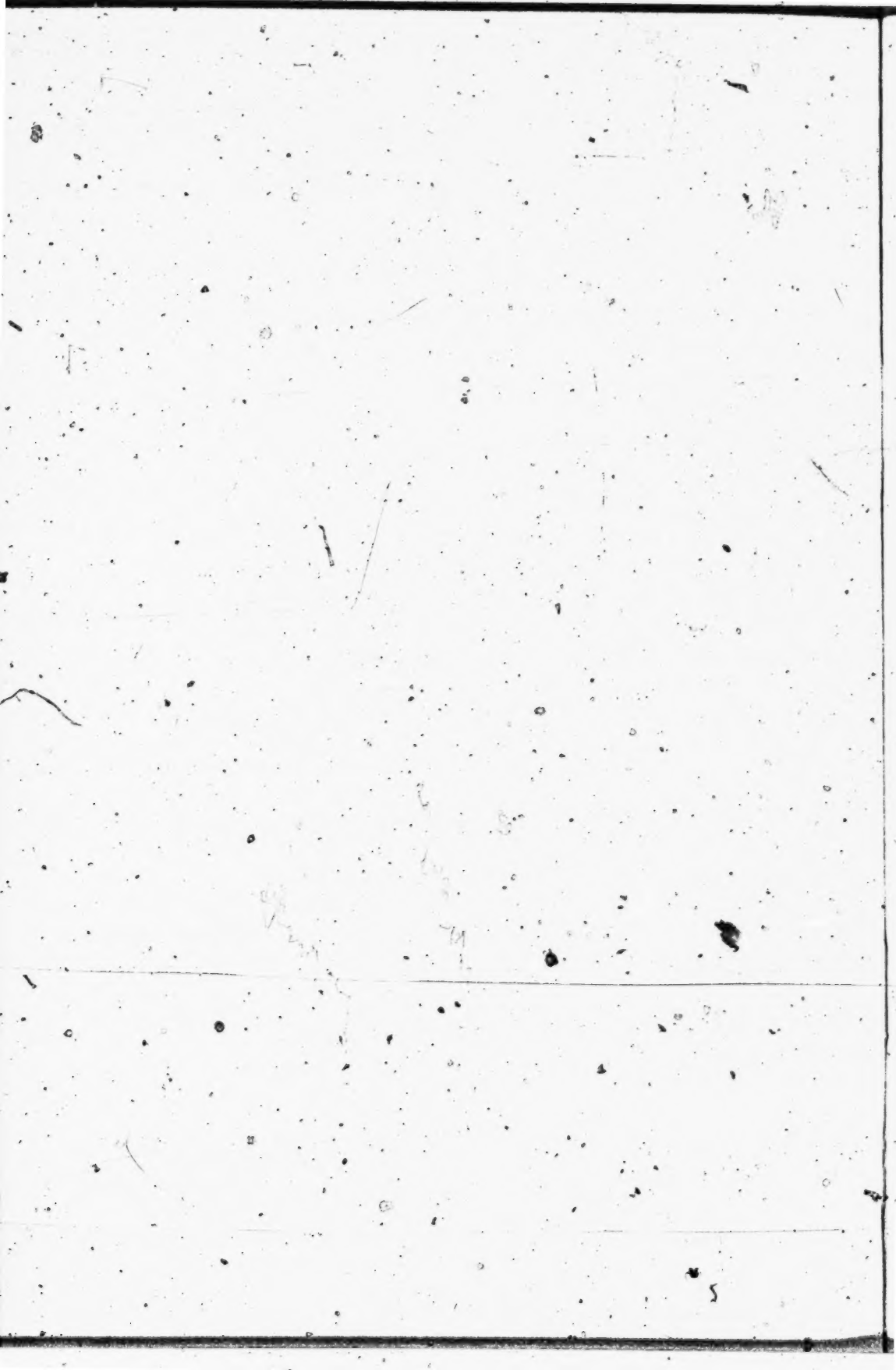
THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and All
Others Similarly Situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

Petition for Certiorari Filed May 21, 1968
Certiorari Granted October 21, 1968



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 117

THE GAS SERVICE COMPANY,
Petitioner,

VS.

OTTO R. COBURN, on Behalf of Himself and All
Others Similarly Situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO THE BRIEFS

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DOCKET ENTRIES

Before the United States District Court for the District of Kansas

Filing Date

December 13, 1966	Complaint
January 30, 1967	Motion to Dismiss Complaint
January 30, 1967	Affidavit in Support of Motion to Dismiss
May 29, 1967	Memorandum denying Motion to Dismiss Complaint
June 23, 1967	Order Overruling Motion to Dismiss Complaint
August 1, 1967	Defendants Notice of Appeal
August 4, 1967	Cost bond of Appellant

Before the Court of Appeals for the Tenth Circuit

June 27, 1967	Application for leave to file interlocutory appeal
July 26, 1967	Order granting application for leave to appeal from the Order of the District Court overruling the Motion to Dismiss the Complaint
November 16, 1967	Heard before Lewis, Woodbury and Hickey, Circuit Court Judges
February 23, 1968	Opinion of the Court of Appeals, Tenth Circuit
February 23, 1968	Judgment of the Court of Appeals, Tenth Circuit
March 14, 1968	Petition for Rehearing
March 14, 1968	Application for Rehearing En Banc
March 26, 1968	Order denying application for rehearing en banc
March 26, 1968	Order denying Petition for Rehearing

Before the Supreme Court

May 21, 1968	Petition for Writ of Certiorari
October 21, 1968	Order of Supreme Court granting Petition for Writ of Certiorari

COMPLAINT

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

OTTO R. COBURN

on behalf of himself and all
others similarly situated,

Plaintiffs,

vs.

GAS SERVICE COMPANY,

a Delaware Corporation,

Defendant.

Case No. T-4172

(Filed December 13, 1966)

Comes now plaintiff and alleges the following claim for relief:

1. Plaintiff is a citizen of the State of Kansas with his residence and post office address at R.F.D. No. 3, Arkansas City, Kansas. Defendant is a corporation organized under the laws of the State of Delaware with its principal office and place of business at 700 Scarritt Building, Kansas City, Missouri. Defendant is authorized to engage in business in the State of Kansas and its registered agent for service of process is Signor J. Fink, 200 West Sixth Street, Topeka, Kansas. This is an action between citizens of different states with an amount in controversy in excess of \$10,000.00, exclusive of interest and costs.

2. The defendant has for the past fifteen (15) years or more, marketed natural gas to citizens of the State of Kansas residing or having their burner-tip outlets outside the city limits of various cities in the State of Kansas, and the plaintiff is one of the defendant's customers so situated. The persons constituting the class similarly situated with the plaintiff, exceed 18,000 in number and are

so numerous that the joinder of all members is impracticable; there are questions of law and fact in this action common to the class; the claim of the plaintiff is typical of the claims of other members of the class; and the prosecution of this action by the plaintiff will fairly and adequately protect the interests of the class. There exists one or more of the conditions described in subdivisions (1), (2) and (3) of Rule 23 (b), Federal Rules of Civil Procedure, and by reason thereof, this action is properly brought by the plaintiff as a class action.

3. Plaintiff has maintained his residence continuously at the location described above, outside the city limits Arkansas City, Kansas, since the year 1954, and has continuously purchased natural gas from the defendant for consumption outside the city limits. Defendant has charged and billed the plaintiff and all other members of the class and has been paid for the volume of natural gas consumed or properly charged to the plaintiff's account computed according to the defendant's gas metering device.

4. On the monthly billings prepared and sent by the defendant to each of its customers constituting a member of the class and including the plaintiff, the defendant has included and has compelled the plaintiff and other members of the class to pay an additional charge designated under various hearings, but usually termed, a "franchise tax." The charge to the account of the plaintiff and all other consumers similarly situated who are members of the class and reside or maintain the point of gas consumption outside the city limits, and the billing and collection of such amounts and taxes by the defendant was and is unlawful and unauthorized because such "franchise taxes" were actually franchise revenues or duties on city franchise rights of the defendant which were unlawfully and arbitrarily extended and charged to consumers of natural gas at points outside the city limits.

5. The exact amount of the unlawful charges made by the defendant and collected from the plaintiff and the other members of the class is unknown to the plaintiff, but is far in excess of the jurisdictional amount of \$10,000. The exact amount of such unlawful and unauthorized charges and collections is exclusively within the knowledge of the defendant and should be reflected accordingly in its books and records.


WHEREFORE, plaintiff prays:

(a) That the court determine this to be a class action properly instituted under Rule 23, Federal Rules of Civil Procedure;

(b) That the plaintiff recover judgment for himself and all other members of the class against the defendant in the amounts properly due each member of the class as the result of the defendant's unlawful and unauthorized imposition and collection of the charges described in this complaint, together with interest at 6% per annum from the date of each collection until repayment.

(c) That the court determine and award reasonable and proper attorney fees for the prosecution of this action on behalf of the plaintiff and all other members of the class; and

(d) for the recovery by plaintiff and other members of the class of the costs of this action, including the reasonable costs of discovery and accounting, and for such other and further relief as plaintiff or the class may be shown to be entitled.



MOTION TO DISMISS**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

[Same Title]

(Filed January 30, 1967)

Comes now the defendant and moves the Court for an order dismissing this action for want of jurisdiction over the subject matter for the following reasons:

1. Paragraph 1 of plaintiffs' complaint predicates jurisdiction upon 28 U.S.C. 1332 which requires that in actions between citizens of different states the amount in controversy shall exceed the sum of \$10,000.00, exclusive of interest and costs.

2. As shown by the attached Affidavit of Jerry T. Duggan, Executive Vice President of defendant, the maximum amount in controversy between the named plaintiff and defendant can not exceed or equal the sum of \$10,000.00.

3. For purposes of determining the amount in controversy herein the claim of plaintiff may not be aggregated with the claims of any other persons similarly situated. *Matzen v. Socony Mobil Oil Company, Inc.*, Case No. W-3426, United States District Court for the District of Kansas, opinion of The Honorable Wesley E. Brown.

WHEREFORE, defendant prays that this action be dismissed at the cost of plaintiff.

AFFIDAVIT

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

[Same Title]

(Filed January 30, 1967)

STATE OF MISSOURI)
) SS.
COUNTY OF JACKSON)

I, Jerry T. Duggan, being first duly sworn on my oath,
state:

1. That I am Executive Vice President and General Counsel of The Gas Service Company, defendant in civil action No. T-4172, pending in the United States District Court for the District of Kansas, and I am authorized and empowered to make this Affidavit on behalf of The Gas Service Company.

2. That I have caused an investigation to be made of all sums collected by The Gas Service Company from Otto R. Coburn, the plaintiff named in said civil action, as charges in addition to the sums owing by Otto R. Coburn for natural gas delivered to his residence at R.F.D. No. 3, Arkansas City, Kansas, which said additional charges are described in Paragraph 4 of the Complaint in said civil action No. T-4172.

3. That from the investigation so made I have determined that commencing with the bill sent to Otto R. Coburn for gas service during the month of April, 1964, there was added to the charge made to Otto R. Coburn for gas service an additional charge, representing Otto R. Coburn's pro rata share of a franchise tax imposed by the City of Arkansas City, Kansas, and that on each bill rendered to the said

Otto R. Coburn subsequent to April, 1964, up to and including the bill rendered for gas service during the month of February, 1966, an additional charge was added to each bill rendered to Otto R. Coburn for the same purpose. The sums owing by Otto R. Coburn for natural gas delivered to his premises, plus the additional sums added thereto for sales tax imposed by the State of Kansas and for Otto R. Coburn's pro rata share of the franchise tax imposed by the City of Arkansas City, Kansas, as aforesaid, for each month subsequent to April, 1964, as stated on each bill rendered to the said Otto R. Coburn, were as follows:

<u>Date of Bill</u>	<u>Charges for Natural Gas</u>	<u>Franchise Tax</u>	<u>Sales Tax</u>	<u>Total</u>
April, 1964	13.64	.68	.36	14.68
May, 1964	4.41	.22	.12	4.75
June, 1964	3.46	.17	.09	3.72
July, 1964	1.56	.08	.04	1.68
Aug., 1964	-0-*	-0-	-0-	-0-
Sept., 1964	-0-	-0-	-0-	-0-
Oct., 1964	2.99	.15	.08	3.22
Nov., 1964	2.99	.15	.08	3.22
Dec., 1964	12.02	.60	.32	12.94
Jan., 1965	14.87	.74	.39	16.00
Feb., 1965	16.30	.82	.43	17.55
Mar., 1965	15.82	.79	.42	17.03
Apr., 1965	15.82	.79	.42	17.03
May, 1965	3.94	.20	.12	4.26
June, 1965	1.56	.08	.05	1.69
July, 1965	1.56	.08	.05	1.69
Aug., 1965	1.56	.08	.05	1.69
Sept., 1965	1.56	.08	.05	1.69
Oct., 1965	2.99	.15	.09	3.23
Nov., 1965	3.93	.20	.12	4.25
Dec., 1965	9.15	.46	.29	9.90
Jan., 1966	9.62	.48	.30	10.40
Feb., 1966	16.26	.81	.51	17.58
(Totals)	156.01	7.81	4.38	168.20

*No service was rendered during the months of August and September, 1964, so no bills were sent.

4. That no sums were added to monthly bills submitted to Otto R. Coburn as and for his pro rata share of the franchise tax imposed by the City of Arkansas City, Kansas, or by any other city, after the bill rendered for service during the month of February, 1966, and the total of all sums added to bills rendered to Otto R. Coburn, and paid by him to The Gas Service Company for franchise taxes was \$7.81, as shown in the next preceding paragraph.

Further, Affiant sayeth not.

MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

[Same Title]

(Filed May 29, 1967)

Templar, District Judge:

Plaintiff Coburn, a citizen of Kansas, on behalf of himself and all others similarly situated, brought this action against defendant Gas Service Company, a Delaware Corporation, with principal offices and place of business in Kansas City, Missouri, alleging that the amount in controversy exceeds \$10,000, and that defendant markets gas to citizens of Kansas having their residence and burner-tip outlets outside the city limits of various cities in the State of Kansas, and that plaintiff is one of the defendant's customers so situated. It is further alleged that the persons constituting the class similarly situated with plaintiff exceed 18,000 in number and are so numerous that the joinder of all members is impracticable; that there are questions of law and fact in this action common to the class; the claim of the plaintiff is typical of the claims of other members of the class; and the prosecution of this

action by the plaintiff will fairly and adequately protect the interests of the class. It is further alleged that there exists one or more of the conditions described in sub-divisions (1), (2) and (3) of Rule 23(b), Federal Rules of Civil Procedure, and by reason thereof the action is properly brought by the plaintiff as a class action.

It is further alleged that plaintiff along with the other members of the class have purchased natural gas from defendant for consumption outside of the city limits of any incorporated city and that defendant has charged them, billed them and has been paid for a large volume of natural gas consumed; that the charges included, and plaintiff and other members of the class have been compelled to pay, an additional charge designated as a "franchise tax"; that the billing and collection of the apportioned amount of said tax to the plaintiff and those in his class is unlawful and unauthorized because such "franchise tax" are revenues or duties on city franchise rights of defendant which it has arbitrarily extended and charged to customers at points outside the city limits; it is further alleged that the amount of unlawful charges collected by defendant from plaintiff and members of the class is in excess of the jurisdictional amount of \$10,000; plaintiff prays that the Court determine this to be a class action properly instituted under Rule 23 of F.R.C.P.

Defendant has filed a motion to dismiss on the grounds that plaintiff's complaint predicates jurisdiction upon 28 U.S.C. §1332 which requires that an action between citizens of different states, the amount in controversy shall exceed the sum of \$10,000 exclusive of interest and costs. Attached to the motion and made a part of it is the affidavit of an officer of the defendant corporation stating that plaintiff Coburn's pro rata share of franchise tax from April 1964 to February 1966 inclusive, amounts to \$7.81. No chal-

lenge is made of plaintiff's contention that the total amount so collected and received by defendant from all members of the class exceeds the sum of \$10,000.00. Defendant further alleges that for purposes of determining the amount in controversy herein the claim of the plaintiff cannot be aggregated with the claims of any other persons similarly situated.

Thus, brought into sharp focus is the question of whether the amounts claimed to be recoverable by the class, in event plaintiff's claim is sustained for the class, may be aggregated for the purpose of sustaining the Court's jurisdiction.

The action is sought to be maintained under Rule 23 of the Federal Rules of Civil Procedure as amended, which amendment became effective July 1, 1966. This Court has endeavored to get a fair statement of reasons for changing the rule, but after considerable research concludes that the Advisory Committee's note found at 39 F.R.D. 98 describes the terms used by the Court as a basis for classification of various kinds of class action and states that they proved to be obscure and uncertain and so an amended rule describing "in more practical terms the occasion for maintaining class actions" and providing that all class actions maintained to the end as such will result in judgments including those whom the Court finds to be members of the class, whether or not the judgment is favorable to the class, and refers to the measures which can be taken to assure the fair conduct of these actions.

Whether the situation has been improved by the establishment of amended Rule 23 remains to be seen. The problem presented in this case remains to be spelled out.

The Advisory Committee observed that the categories of class actions in the original rule were defined in terms

of the abstract nature of the rights involved: the so-called "true category" was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights relating to "specific property"; and the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the "class suit device" and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. The Committee also observed that in practice the terms "joint", "common", etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain, and that the Courts had considerable difficulty with these terms. It was further observed that the Rule did not provide an adequate guide to the proper extent of judgments in class actions.

It was noted by the Committee that the original Rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class.

The Court's research on this problem includes its consideration of the statement by Professor Wright found on page 89 of the 1966 pocket part to Volume 2, Barron & Holtzoff's Federal Practice and Procedure, wherein he discusses directly the problem now before the Court. He says:

"The greatest difficulty comes with regard to jurisdictional amount. As a function of the general principle that aggregation is permitted by parties jointly or commonly interested, but not where claims are sev-

eral and distinct, it was held under the former rule that aggregation of the claims of all members of the class was permitted in 'true' class action, where the rule required a 'joint' or 'common' interest, but not in 'hybrid' or 'spurious' class action. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversy'. A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached.

"If the Courts continue to apply the ancient learning, it will be necessary to consider in each case, in which the claims of the named representatives are not themselves for more than \$10,000, whether the interests involved are 'joint' or 'common', an inquiry which is frequently quite difficult and which it was a purpose of the amended rule to avoid. If the interests are joint or common, then the relation of the parties will be such that their action would fall under (b) (1), but it does not follow that all (b) (1) actions will involve joint or common interests."

Before the amendment to Rule 23, a class action brought on behalf of numerous persons having a *joint* or *common interest* or *title* in the subject matter of the suit could, where the value of the interest involved exceeded the jurisdictional amount, be maintained in a Federal District Court.* *Clark v. Paul Gray, Inc.*, 306 F.2d 323, *Bolsenberg v. Chicago Title & Trust Company*, 128 F.2d 245, Anno. 141 A.L.R. 565.

On the other hand, where the right exists in favor of many as against one, or in favor of one as against many, and in its nature is separable, then the separable values

could not be added together to make the jurisdictional sum, and the separable value furnished the jurisdictional test. *Elliott v. Empire Natural Gas Co.*, 4 F.2d 493, 497, *Clark v. Paul Gray, Inc.*, (supra).

It is reasonable to conclude that the able and competent persons who were responsible for the change in Rule 23, had in mind some improvement in the utilization of the Federal Rules of Civil Procedure as now formulated and adopted, presumably their recommendations were considered by the Supreme Court of the United States, else the amended rule would not have been adopted. Clearly, the defects of the prior rule were to be eliminated.

To adopt the position urged by defendant here has the effect of nullifying what this Court believes is the object and purpose of the amended rule. As this Court views the situation, if defendant's theory is adopted, plaintiff here and those situated with him are limited to the permissive joinder authorized by Rule 20. Surely, the distinguished members of the advisory committee, not to mention the Supreme Court, had something other than this in mind when Rule 23 was modified, otherwise Rule 23 as a practical matter could have been eliminated.

The revisors of the rule acknowledged the difficulty encountered in the use of such terms as "joint", "common" or "secondary" and these features were eliminated from the new rule. Likewise if the Committee's note is to be given any weight, the distinctions of "true", "spurious" and "hybrid" class actions were removed. This is borne out by the statement on page 100 of 39 F.R.D.,

"The difficulties which would arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device."

And this is submitted in connection with the statement (p. 103) that in cases where the Court finds that the questions common to the class predominate over the questions affecting individual members that economies can be achieved by the class-action device.

In the case at bar the questions presented would be common to the class. There is no conceivable question that could otherwise predominate here. The Court can see no obstacle to a finding that the questions common to the class predominate over the questions affecting individual members. Furthermore, the conditions required by Rule 23 appear to exist under the allegations in the complaint.

Defendants place their reliance upon the case of *Matzen v. Socony Mobil Oil Company, Inc.*, case W-3426 (unreported), where the Court held that claims united in a class action which are not joint but which, in fact, are separate claims of the individual persons, cannot be aggregated to sustain removal from state court. The rule announced in *Matzen* follows the decision of the Tenth Circuit Court of Appeals in *Aetna Insurance Company v. Chicago, Rock Island & Pacific Railroad Co.*, 229 F.2d 584, a case decided before Rule 23 was amended. Significantly, the *Matzen* opinion reads:

"We hold that aggregation in class suits must be determined by the principles which have heretofore governed aggregation in non-class suits. The claims must be not only common in the sense of a community of interest in the rights asserted, they must be undivided in the sense that they constitute in their totality an integrated right."

The above statement is the correct statement of law, as it existed before Rule 23 was amended. If it be declared the law under amended Rule 23, then there was no

purpose in amending the rule for the reasons given by the revisors.

This Court has studied the opinion in the case of *Alvarez et al. v. Pan American Life Insurance Company*, No. 22902, March 27, 1967, decided by the Fifth Circuit Court of Appeals, a copy of which was furnished to the Court by defendant's counsel. It is fairly obvious that if the law announced in *Alvarez* is to be followed, then amended Rule 23 serves little useful purpose. To support the law announced, the Fifth Circuit was required to fall back on the classifications developed under former Rule 23, now condemned and rescinded.

To sustain *Alvarez*, the Court found it necessary to conclude that Rule 82 furnishes the basis for rejecting jurisdiction under Rule 23. It says:

"These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts . . ."

The Fifth Circuit then falls back on interpretations applied to the jurisdictional problems by the Courts in dealing with "true", "hybrid", or "spurious" classifications which were eliminated by the amended rule.

If it is to be the law that this Court can entertain a class action only when each member of the class to be bound has a claim for more than the jurisdictional amount, that rule should be clearly announced. Support should not rest on rules developed under the former Rule 23. The new rule seems designed to give the trial court substantial discretion in determining whether at the outset, the action can be maintained and if so, to what extent the judgment rendered shall apply. Rule 23(d) is a broad outline of procedure and provides for orders the Court may make in conducting a class action.

The authors of the amended rule must have taken into account the possibility that the position contended for by plaintiff here would result in an unwarranted extension of federal jurisdiction when they placed in the Committee note the following statement (p. 104):

"The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. . ."

The uncertainty of the proper application of present Rule 23 indicates that an early interpretation of it should be clearly made.

The Court will deny the motion of defendant to dismiss for the reason that in the judgment of this Court, none of the grounds stated in the motion to dismiss are sufficient to require dismissal.

The Court will, if application is timely made, permit an appeal to be taken from this order as provided by 28 U.S.C. 1292(b).

Prevailing counsel will prepare, circulate and submit order to be approved and entered by the Court, and which, when entered, shall constitute the order of the Court denying defendant's motion to dismiss.

DATED at Topeka, Kansas this 29th day of May, 1967.

/s/ George Templar
United States District Judge

ORDER**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS****[Same Title]****(Filed June 23, 1967)**

On April 14, 1967, the parties appeared by and through their respective counsel of record and presented oral argument to the court on defendant's motion to dismiss for lack of jurisdiction.

During the course of argument it was stipulated by counsel for the parties that the amount of the plaintiff's claim is less than \$10,000, and that counsel for plaintiff at this time is not aware of any member of the class whom plaintiff seeks to represent whose individual claim would equal or exceed \$10,000.

After hearing argument of counsel, the matter was taken under advisement by the court.

Thereafter, having examined the pleadings, the briefs, and being duly advised in the premises, the court issued its Memorandum and Order on the 29th day of May, 1967, which memorandum having been filed with the clerk is incorporated herein and made a part hereof by reference.

For the reasons set forth in the aforesaid memorandum,

IT IS BY THE COURT ORDERED that defendant's motion to dismiss for lack of jurisdiction should be, and it hereby is, overruled.

The court finds and is of the opinion that the above ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and

that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

Upon application timely made, the defendant may appeal from this order as provided in 28 U.S.C. 1292(b).

/s/ George Templar
Judge

NOTICE OF APPEAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

[Same Title]

(Filed August 1, 1967)

Notice is hereby given that Gas Service Company, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit, from the order overruling defendant's motion to dismiss, entered in this action on the 23rd day of June, 1967.

**ORDER GRANTING APPLICATION FOR LEAVE TO
APPEAL FROM THE ORDER OF THE DISTRICT
COURT OVERRULING THE MOTION TO DISMISS
THE COMPLAINT**

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

January Term, 1968

THE GAS SERVICE COMPANY,
Appellant,

vs.

**OTTO R. COBURN, on behalf of
himself and all others similarly
situated,**

Appellee.

No. 9635
No. I. A. 50
(No. T-4172 Civil)

(Filed July 28, 1967)

**ELEVENTH DAY, JULY TERM, WEDNESDAY, JULY
26th, 1967**

Before Honorable Alfred P. Murrah, Chief Judge,
and Honorable David T. Lewis, Honorable Jean S.
Breitenstein, Honorable Delmas C. Hill, Honorable
Oliver Seth and Honorable John J. Hickey, Circuit
Judges

This cause came on to be heard on application for leave
to appeal from an order of the United States District Court
for the District of Kansas in the above entitled cause and
was submitted to the court.

On consideration whereof, it is now here ordered that
said application of Gas Service Company for leave to ap-
peal from an order of the United States District Court for
the District of Kansas in the above entitled cause be and
the same is hereby granted and that the notice of appeal
shall be filed with the United States District Court for the

District of Kansas within the time fixed by Rule 73(a), Federal Rules of Civil Procedure, for taking an appeal or within ten days from this date, whichever is later.

It is further ordered that a certified copy of this order be transmitted to the clerk of the United States District Court for the District of Kansas.

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

[Same Title]

No. 9635

February 23, 1968

Before **WOODBURY, LEWIS** and **HICKEY**, Circuit Judges,

LEWIS, CIRCUIT JUDGE:

This is an interlocutory appeal authorized in compliance with 28 U.S.C. § 1292(b) to allow appellate consideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. § 1332 where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption out-

side the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding \$10,000, and that such individual claims are variable in amount¹ but would aggregate to more than \$10,000.

The trial court found, and it seems indisputable, that plaintiff's action definitively meets each prerequisite to a class action as presently set out in Rule 23(a) and one or more of the additional requirements of 23(b).² The class

1. By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was \$7.81.

2. The amended Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

is numerous, a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment³ would not

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

3. The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

have been classified as a "true" class action and aggregation of claims would not have been permitted. See *Aetna Ins. Co. v. Chicago Rock Island & Pac. R.R.*, 10 Cir., 229 F.2d 584. The Fifth Circuit in *Alvarez v. Pan American Life Ins. Co.*, 375 F.2d 992, has held that this result is still dictated after adoption of the new rule. Citing *Clark v. Paul Gray, Inc.*, 306 U.S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,⁴ the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F.2d at 995. We must respectfully disagree.

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In *Gibbs v. Buck*, 307 U.S. 66, 72, the Supreme Court stated it thus:

" . . . federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

4. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.⁵ The Advisory Committee's Note, 39 F.R.D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true," "hybrid," and "spurious." "In practice," said the Committee, "the terms 'joint,' 'common,' etc. which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in *Provident Bank v. Patterson*, U.S., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: " (1) there is a category of persons called 'indispensible parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to

5. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, *Gibbs v. Buck, supra*, and it follows, under the new rule, that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy.⁶

The judgment is affirmed and the cause remanded for further proceedings.

6. Professor Wright considers this to be a realistic view. He states:

"The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."

ORDER
DENYING REHEARING EN BANC
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Chief Judge,
and Honorable David T. Lewis, Honorable Jean S.
Breitenstein, Honorable Delmas C. Hill, Honorable
Oliver Seth and Honorable John J. Hickey, Cir-
cuit Judges

[Same Title]

(Filed March 26, 1968)

This cause came on to be heard on the petition of appellant for a rehearing herein en banc and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing en banc be and the same is hereby denied.

ORDER DENYING REHEARING
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Before Honorable Peter Woodbury, Honorable David T.
Lewis and Honorable John J. Hickey, Circuit Judge

[Same Title]

(Filed March 26, 1968)

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing be and the same is hereby denied.

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MAY 17 1968

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [REDACTED]

109

MARGARET E. SNYDER, Also Known as PEG SNYDER,
Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No.

MARGARET E. SNYDER, Also Known as PEG SNYDER,
Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit.

Petitioner Margaret E. Snyder, also known as Peg Snyder, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 27, 1968.

CITATIONS TO OPINIONS BELOW.

The opinion of the United State Court of Appeals for the Eighth Circuit is not reported and is printed in Appendix A hereto, infra, pp. 13-14, and in U. S. C. A. Pro-

ceedings, Pages 1-2.¹ The opinion of the United States District Court for the Eastern District of Missouri is not reported and is printed in Appendix B hereto, *infra*, pp. 15-22, and in Printed Record at Pages 16-23.

JURISDICTION.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 27, 1968 (U. S. C. A. Proceedings, Page 3). Petitioner's Petition for Rehearing, or, in the Alternative, to Transfer to the Court En Banc, was duly and timely filed in said United States Court of Appeals for the Eighth Circuit (U. S. C. A. Proceedings, Page 4). Said Petition for Rehearing, or, in the Alternative, to Transfer to the Court En Banc, was denied on March 22, 1968 (U. S. C. A. Proceedings, Page 16).

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether under Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where a class action under the amended rule is otherwise appropriate.

¹ For convenience the Record of the District Court proceedings will be herein referred to as the Printed Record and the Record of the proceedings of the Court below, inserted immediately following such Printed Record, will be referred to as the U. S. C. A. Proceedings.

**STATUTE AND FEDERAL RULE OF CIVIL
PROCEDURE INVOLVED.**

28 U. S. C., § 1332 (a) (1). The said 28 U. S. C., § 1332 (a) (1) provides:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000.00, exclusive of interest and costs, and is between—

(1) citizens of different States;”

Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966. The provisions in said rule are lengthy and the text is set forth in Appendix C hereto, infra, pp. 23-26.

STATEMENT.

Petitioner filed this class action pursuant to Amended Rule 23, Federal Rules Civil Procedure, effective July 1, 1966 in the United States District Court for the Eastern District of Missouri, Eastern Division, to recover judgment in the amount of \$1,200,000.00 for the class (Printed Record pp. 1-5). In her Amended Complaint (Printed Record pp. 9-13) Petitioner alleged that:

Petitioner is a citizen of Arizona and the Respondents are citizens of Missouri; there is diversity of citizenship, and the amount in controversy exceeds \$10,000.00 exclusive of costs and interest; since prior to November 22, 1966, Petitioner has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (Missouri Fidelity) and owns 2,000 of said company's shares; the bylaws of Missouri Fidelity provide for a board of fifteen directors and Respondents at all times relevant were members of said board; on or about November 22, 1966 eight of the Missouri Fidelity directors including the Re-

spondents entered into an agreement with National Western Life Insurance Company (National Western) whereby and in pursuance of which National Western purchased from such eight directors and relatives and friends of theirs 300,000 Missouri Fidelity shares and paid them therefor a premium of about \$1,200,000.00 in excess of the then market price and as condition for such purchase said eight directors resigned, and such proceedings were had that five nominees of National Western were elected directors of Missouri Fidelity and as a majority of its executive committee and of its investment committee; such premium of \$1,200,000.00 was paid by National Western for the resignations of the directors who so resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity; the mentioned conduct and acts of said eight directors including Respondents were a breach of trust and in violation of their duties as Missouri Fidelity directors;

The class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states and it would not be practical for all of them to join or be joined in this action and Petitioner brings this action on behalf of herself and all other shareholders of Missouri Fidelity; that by reason of the aforesaid matters the said premium of approximately \$1,200,000.00 should be distributed to Petitioner and the other shareholders of Missouri Fidelity similarly situated.

The prayer in the amended complaint prayed that the Court enter its Order determining that a class action shall be maintained and that the Court enter judgment in the amount of \$1,200,000.00 in favor of Plaintiff and other Missouri Fidelity shareholders in accordance with the Missouri Fidelity shares held by them respectively and for attorneys' fees and costs and that the Court's judgment include and describe those whom the Court finds to be members of the class.

The Respondents filed a motion to dismiss the Amended Complaint (Printed Record p. 14). Such motion alleged various grounds for dismissal of the Amended Complaint, including lack of jurisdictional amount. In its Opinion the District Court stated that for reasons set forth in its Opinion the Court need only consider the question of lack of jurisdictional amount (Printed Record p. 18).

The Respondents contended that if the Petitioner has pleaded a class action, she has pleaded a "spurious" class action and that the jurisdictional amount in such action may not be determined by aggregating the amounts which might be claimed by others in the class action, and that the Petitioner's individual claim can amount to no more than \$8,740.00. The Petitioner, on the other hand, contended that since "spurious" class actions no longer exist under Rule 23, F. R. C. P., as amended July, 1966, and since a judgment in any class action under said Amended Rule 23 is now binding upon the entire class, the claims of the entire class are in controversy and should, therefore, be aggregated in arriving at the jurisdictional amount (District Court's Opinion, Printed Record, p. 18).

The District Court sustained Respondent's motion to dismiss Petitioner's Amended Complaint and dismissed the action without prejudice on the ground that Petitioner's claims are separate and distinct from those of other persons in the class, that Rule 23 as amended has not changed the rule existing prior to the amendment that in such a case the claims could not be aggregated in arriving at the jurisdictional amount, that therefore Petitioner may not aggregate her claim with those of others in the class, that Petitioner alleged her damages at \$8,740.00, and that accordingly, the amount in controversy does not exceed \$10,000.00 and the Court therefore lacked jurisdiction over the controversy. The District Court's Memorandum

Opinion and Order of Dismissal appears at Printed Record pp. 1-16 and is printed in Appendix B hereto, *infra*, pp. 15-22.

On Petitioner's appeal, the District Court's said Order and Judgment was affirmed on February 27, 1968, by the United States Court of Appeals for the Eighth Circuit on the basis of the District Court's opinion and of the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 Federal 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 826 (1967) (Eighth Circuit Court of Appeals Opinion, Appendix A, *infra*, pp. 13-14; U. S. C. A. Proceedings, pages 1-2). The Court of Appeals Judgment was entered on February 27, 1968, and is set forth at U. S. C. A. Proceedings, p. 3. Rehearing was denied on March 22, 1968 (U. S. C. A. Proceedings, page 16).

On February 23, 1968, in the case of **The Gas Service Company v. Coburn, etc.**, not yet reported in the Federal Reporter, the United States Court of Appeals for the Tenth Circuit rendered a decision in direct conflict with the above mentioned opinions of the District Court and of the Court of Appeals for the Eighth Circuit, and of the ruling of the Fifth Circuit in **Alvarez**, above mentioned, on which the Eighth Circuit relied in the instant case (The Fifth Circuit Court of Appeals decision in **Alvarez** is set forth in Appendix E, *infra*, pp. 34-44.

On March 14, 1968, Petitioner timely filed in the Eighth Circuit Court of Appeals her Petition for Rehearing or in the Alternative, to Transfer to the Court En Banc and therein called attention to the above mentioned ruling and decision of the Tenth Circuit Court of Appeals and filed with her said Petition as an appendix thereto a copy of the Opinion of the Tenth Circuit in **The Gas Service Company**, *supra*. Said Petition is set forth commencing at page 4 of U. S. C. A. Proceedings, and the

opinion of the Tenth Circuit in **The Gas Service Company** is set forth in U. S. C. A. Proceedings, pages 10-15 and in Appendix D, *infra*, pp. 27-33.

In **The Gas Service Company v. Coburn**, *supra*, the United States Court of Appeals for the Tenth Circuit expressly held that even though the claims of the individuals constituting the class in the case there presented were neither "joint" nor "common" yet under Rule 23, Fed. R. Civ. P., as amended in July 1966, the claims of the entire class were in controversy and could be aggregated for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., Section 1332. With respect to the decision of the United States Court of Appeals for the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992, relied on by the Eighth Circuit in the instant case, the Tenth Circuit stated: "We must respectfully disagree * * *"

Petitioner's said Petition for Rehearing, or in the Alternative to Transfer to the Court en Banc, was denied by the Eighth Circuit Court of Appeals on March 22, 1968. U. S. C. A. Proceedings, p. 16.

REASONS FOR GRANTING THE WRIT.

The decisions of the Eighth Circuit Court of Appeals in the instant case (Appendix A hereto, *infra*, pp. 13-15) and of the Fifth Circuit Court of Appeals in **Alvarez v. Pan American Life Insurance Company**, 375 Fed. 2d 992, cert. denied, 389 U. S. 826 (Appendix E hereto, *infra*, pp. 34-44), upon the authority of which the instant case was decided, are directly in conflict with the decision of the Tenth Circuit Court of Appeals in **The Gas Service Company v. Coburn, etc.**, not yet reported in the Federal Reports (Appendix D, *infra*, pp. 27-33); The question at issue here involved is of great importance in the adminis-

tration of justice and is a matter of great importance with respect to the interpretation and application of Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966; It is of great importance in the administration of justice that there be a uniform interpretation and application of Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966, among the United States Courts of Appeal; By its decision the Court below has decided an important question of Federal law which has not been, but should be, settled by this Court and particularly since Court of Appeals' decisions on such questions are in conflict; The decisions of the Eighth Circuit Court of Appeals in the instant case and the Fifth Circuit Court of Appeals in **Alvarez**, *supra*, do injustice to the Petitioner herein and will have the effect of preventing small claimants from having a forum in which to seek redress for alleged wrongs and said decisions are thereby in direct conflict and derogation of the purposes of said Rule 23, as amended.

Prior to the amendment of Federal Rule 23 the action here involved would have been classified as a "spurious" class action and the aggregation of claims to satisfy the jurisdictional amount requirement of 28 U. S. C., Section 1332, would not have been permitted. **Pinel v. Pinel**, 240 U. S. 594, 60 L. Ed. 817, 36 Sup. Ct. 416. The theory of **Pinel**, *supra*, was that aggregation should be allowed if the claims of the Party—Plaintiffs were "joint" or there was a "common interest" involved (sometimes referred to as a "true" class action) but not in cases where the claims of the Party-Plaintiffs were several (sometimes referred to as "hybrid" or "spurious" class action).

Rule 23 as amended in July, 1966, completely eliminated the distinction between true, hybrid and spurious class actions and for the first time provides that in an action properly brought as a class action under Amended Rule 23 there may be a binding judgment on all members of

the class regardless of whether or not said class members have entered their appearance in the case and regardless of whether or not the judgment is favorable to the class. The purpose of these important changes made by said Amended Rule 23 was to broaden and make more flexible the provisions as to class actions and to provide a forum for small claimants who might otherwise, for practical reasons, be deprived of their day in court. In many cases the cost of investigating and pursuing an individual action is prohibitive for the small claimant. It was contemplated by the framers of Amended Rule 23 that small claimants could under said Amended Rule 23 now attain a just adjudication of their claims because of the economics of the class action provisions of Amended Rule 23.

Judge Alexander Holtzoff, recognizing the intentions and purposes of Amended Rule 23 to broaden and make more flexible said Rule has, in commenting on the new Amended Rules, stated that:

“The Rules as to class actions is broadened and made more flexible. This distinction between true, hybrid and spurious class actions is abrogated. The ultimate result is that as liberal as the Rules were, the progressive Amendments now adopted make them still more liberal and still more flexible.” **Holtzoff; a Judge Looks at the Rules**, Rules of Civil Procedure and Judicial Code, p. 19 (1966 Ed.).

Charles Alan Wright, Professor of Law at the University of Texas and a member of the Committee on Rules of Practice and Procedure which drafted the revised rules, and who has long been a leading authority on the Federal Rules, in commenting on the broadened and more flexible purposes of Amended Rule 23, stated:

“* * * it was held under the former rule that aggregation of the claims of all members of the class

was permitted in the 'true' class action, where the rule required a 'joint' or a 'common' interest, but not in 'hybrid' or 'spurious' class actions. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversies.' A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached." **Barron & Holtzoff, Federal Practice and Procedure**, Sec. 569 (Supp., p. 58, 1966).

The Eighth Circuit Court of Appeals in the instant case and the Fifth Circuit Court of Appeals in **Alvarez**, supra, completely ignored and rejected the very comprehensive changes contemplated by the amendment to Rule 23 and in effect based their decisions on the old **Pinel** doctrine. The Tenth Circuit Court of Appeals in **The Gas Service Company case**, supra, in rendering its decision in direct conflict to the said Eighth Circuit and Fifth Circuit Courts of Appeal decisions, specifically recognized the very comprehensive changes contemplated by Amended Rule 23 and with respect to the Fifth Circuit Court of Appeals decision (the decision in the instant case had not been rendered at the time) stated:

"We must respectfully disagree."

The Tenth Circuit Court of Appeals in **The Gas Service Company case**, supra, recognized that the procedural tool of a class action must be workable if it is to be desirable and that to hold that the old **Pinel** classifications of

“true”, “hybrid” and “spurious” must be perpetuated to allow or defeat aggregation would render Amended Rule 23 sterile as a workable procedural tool.

CONCLUSION.

For all the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

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APPENDIX

APPENDIX A.

Opinion.

**United States Court of Appeals
For the Eighth Circuit**

No. 18-881

**Margaret E. Snyder, Also Known
as Peg Snyder,**

Appellant,

v.

**Charles Harris and Earl W. Kirch-
hoff,**

Appellees.

**Appeal from the
United States Dis-
trict Court for the
Eastern District of
Missouri.**

[February 27, 1968.]

**Before Van Oosterhout, Chief Judge; Matthes, Circuit
Judge, and Harris, District Judge.**

Per Curiam.

Plaintiff, appellant herein, filed this class action pur-
suant to amended Rule 23, Fed. R. Civ. P., effective July
1, 1966.

Upon motion of the defendants the district court, Honor-
able Roy W. Harper, Chief Judge, dismissed the action
on the ground that the damages claimed by appellant, ex-
clusive of interest and costs, did not exceed the \$10,000.00

jurisdictional amount requisite for diversity jurisdiction under 28 U. S. C., § 1332. *Snyder v. Harris*, 268 F. Supp. 701 (E. D. Mo. 1967).

The pertinent allegations of the complaint are fully incorporated in Judge Harper's opinion and need not be restated here.

The sole question for determination is whether amended Rule 23 allows the plaintiff in a class action to aggregate her claim with those of other class members whom she represents for purposes of satisfying the jurisdictional amount under Section 1332.

Appellant cites no authority in support of her position, except the suggestion of Professor Charles Alan Wright in 2 Barron & Holtzoff, Federal Practice and Procedure, § 569 (Supp. 1967, at 106) that it would be convenient to hold that since a judgment rendered in a class action is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy, and therefore should be aggregated to satisfy the jurisdictional amount. We are not persuaded from our study of amended Rule 23 and the Advisory Committee notes to conclude that the amendment of the Rule was designed to or did in fact change the substantive law proscribing the aggregation of separate and distinct claims in a class action for purposes of conferring jurisdiction under Section 1332.

On the basis of the district court's soundly reasoned opinion and the opinion of the Fifth Circuit in *Alvarez v. Pan American Life Insurance Company*, 375 F. 2d 992 (5th Cir. 1967), *cert denied*, 389 U. S. 827 (1967), we affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

In the United States District Court,
Eastern District of Missouri,
Southeastern Division.

Margaret E. Snyder, also known as Peg Snyder,	} Plaintiff,	} No. S 66 C 78.
vs.		
Charles Harris and Earl W. Kirchhoff,	} Defendants.	

Harper, Judge.

Memorandum Opinion and Order.

(Filed in U. S. District Court on April 27, 1967.)

This matter is before the court on the joint motion of the defendants to dismiss the amended complaint. The motion has been submitted on the briefs of the parties and oral argument.

The plaintiff seeks to bring this action as a class action pursuant to Rule 23, Federal Rules of Civil Procedure, as amended July, 1966. The relevant part of the amended complaint alleges that the plaintiff, Margaret E. Snyder, is a citizen of the State of Arizona, and the defendants, Charles Harris and Earl W. Kirchhoff, are citizens of the State of Missouri; that there is diversity of citizenship and the amount in controversy exceeds \$10,000.00; that since prior to November 22, 1966, the plaintiff has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (hereinafter referred to as Missouri Fidelity) and owns two thousand shares of said company;

that the By-laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen directors and that the defendants were at all times relevant to this action members of said board of directors; that at all times relevant to this action the market price of Missouri Fidelity was about \$2.63 per share; that sometime prior to November 22, 1966, National Western Life Insurance Company (hereinafter referred to as National Western) submitted to the directors of Missouri Fidelity a proposal to purchase from them for \$7.00 per share all of the shares of Missouri Fidelity owned by them, conditioned however, that all directors of Missouri Fidelity, except four, resign as directors and that five nominees of National Western be elected as directors of Missouri Fidelity, and that such nominees be designated and elected as a majority of the executive committee and of the investment committee of Missouri Fidelity; that on or about November 22, 1966, National Western, pursuant to its said offer, entered into an agreement with eight of the directors of Missouri Fidelity, including the defendants herein, to pay to them and to friends and relatives of theirs \$7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors, including the defendants herein, did resign as directors of Missouri Fidelity, and nominees of National Western were designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity; that the afore-said conduct and acts of the said eight directors, including the defendants, were a breach of trust and a violation of their duties as directors of Missouri Fidelity, and National Western procured said resignations and therefore paid or has agreed to pay the said eight directors who resigned, including the defendants herein, and their friends and relatives, a premium of about \$1,200,000.00; and that the aggregate amount paid by National Western

for the said shares was approximately \$1,200,000.00 in excess of the market value of said shares and was a premium paid by it to the said selling shareholders for the resignations of said directors who resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity.

The amended complaint prays for judgment in the amount of \$1,200,000.00, said judgment to be entered in favor of the plaintiff and the other individual shareholders (allegedly over 4,000 in number) according to their respective share holdings.

The present motion alleges various grounds for dismissal of the amended complaint, including lack of jurisdictional amount. For reasons hereinafter set forth, this court need only consider the question of lack of jurisdictional amount.

The defendants contend that if the plaintiff has pleaded a class action, she has pleaded a "spurious" class action and that the jurisdictional amount in such an action may not be determined by aggregating the amounts which might be claimed by others in the class action. Further, the defendants contend that the plaintiff's individual claim can amount to no more than \$8,740.00. The plaintiff, on the other hand, contends that since "spurious" class actions no longer exist under Rule 23, F. R. C. P., as amended July, 1966, and since a judgment in any class action is now binding upon the entire class, the claims of the entire class are in controversy and should, therefore, be aggregated in arriving at the jurisdictional amount.

The law concerning the aggregation of claims in a class suit before the amendment in July, 1966, to Rule 23, F. R. C. P., is fairly stated in Moore's Federal Practice, § 23.13, p. 3480, to-wit:

"In the case of joinder of plaintiffs the matter of aggregation of claims is ruled by the doctrine of *Pinel v. Pinel* (240 U. S. 594, 60 L. Ed. 817). There the rule was laid down that if the demands of the plaintiffs are 'separate and distinct', each must have a claim in the jurisdictional amount, while if they unite to enforce a joint or common interest aggregating is permissible. These principles apply with equal force in the class action, since the class action is but a procedural device to permit some to prosecute or defend an action without the necessity of all appearing as plaintiffs or defendants. Thus in the case of a true class action, if instead of bringing a class action the members of the class joined as plaintiffs, the jurisdictional amount would be determined by the joint or common claim; no one has a several claim. Unless the class suit were utilized all of the members of the class would have to join. Normally this is impracticable, and the class action device is employed; but the jurisdictional amount is determined in precisely the same manner, and aggregation is proper. In the hybrid and spurious class suit, on the other hand, the rights are several and there can be no aggregation, whether the parties all join or the class action is resorted to."

The so-called "spurious" class action under the old Rule 23 was where the character of the right sought to be enforced for or against the class was several, and there was a common question of law or fact affecting the several rights and a common relief was sought (See old Rule 23 (a) (3)). Any judgment in the spurious class action was binding solely on the named parties; it was in reality an invitation to join. By its very definition, the character of the rights sought to be enforced in a spurious class action were "separate and distinct," and, therefore, under the doctrine of *Pinel v. Pinel*, *supra*, such

rights could not be aggregated to make up the jurisdictional amount.

Rule 23, as amended July, 1966, makes no provision for a spurious type of class action, and makes no reference to a "joint" or a "common" interest. The complaint alleges a breach of trust, and in paraphrasing the language of Rule 23 (b) (1), F. R. C. P., there is apparently an attempt to bring this action under such rule. However, since the prayer seeks direct individual damages for the respective shareholders of Missouri Fidelity, this action is more analogous to those situations contemplated by Rule 23 (b) (3), F. R. C. P. (See Notes of Advisory Committee on Rules following 28 USCA, Rule 23, as amended July, 1966.)

Rule 23 (b) (3), F. R. C. P., as amended July, 1966, provides, in part, to-wit:

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) . . .

"(2) . . .

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular form; (D)

the difficulties likely to be encountered in the management of a class action.”

A judgment in a class action brought under Rule 23, as amended, is *res judicata* as to the whole class except as to those members of a (b) (3) type of class action who specifically request to be left out of the action.

Because a judgment in a class action is now binding upon the entire class, and because spurious class actions no longer exist under the amended Rule 23, does it necessarily follow that the doctrine with respect to jurisdictional amount of *Pinel v. Pinel*, *supra*, no longer applies to class actions? This court thinks not.

Pinel v. Pinel, *supra*, specifically states, 1. c. 60 L. Ed. 818, in part, to-wit:

“The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount” (Cases cited).

The *Pinel* doctrine applied with equal force to class actions brought under Rule 23 which was but a procedural device to allow several plaintiffs to unite in a single suit.

Rule 23, as amended, contains nothing to indicate that it has now become something more than a procedural device to permit several plaintiffs to unite in a single suit. The rule in no way purports to affect the jurisdiction of this court, nor do the Notes of the Advisory Committee on Rules indicate that the rule is to have such an effect. There is no reason why the *Pinel* doctrine should suddenly become obsolete with the passage of the amended

Rule 23, unless the new rule somehow changes the character of a plaintiff's right. That it does not is clearly shown by the following excerpt from the Notes of the Advisory Committee on Rules (see p. 62 of notes following 28 USCA, rule 23, as amended July, 1966), to-wit:

"Subdivision (c) (2) makes special provision for class actions maintained under sub-division (b) (3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b) (3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him."

Furthermore, a construal of the amended Rule 23 in such a way as to confer jurisdiction on this court where in a similar situation before the amendment to the rule it would not have had jurisdiction, would constitute a direct violation of Rule 82, F. R. C. P., as amended, which states, in part:

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

See also *DeLorenzo v. Federal Deposit Insurance Corp.*, 259 F. Supp. 193, 1. c. 195, note 5.

The sole question before this court, then, is whether or not the demands of the plaintiff are separate and distinct from other persons in the class. If they are, then under

the Pinel doctrine the plaintiff may not aggregate such claims with those of others in the class.

The allegations of the plaintiff's complaint clearly indicate that her claims are separate and distinct. The complaint alleges that the plaintiff is the owner of 2,000 shares of stock of Missouri Fidelity; that the market price of said stock at the time of the matters complained of was approximately \$2.63 per share; and that the defendants received \$7.00 per share for their stock. The prayer asks for damages in the amount of \$1,200,000.00, to be divided among the individual shareholders in accordance with their respective share holdings. Thus, the plaintiff is alleging that she is entitled to \$8,740.00 damages for her own stock.

For the foregoing reasons the court finds that the amounts in controversy in the present action does not exceed \$10,000.00, and this court, therefore, lacks jurisdiction over the controversy. The defendants' joint motion to dismiss is sustained, and said cause is dismissed without prejudice.

Roy W. Harper,
U. S. District Judge.

APPENDIX C.

Rule 23.

CLASS ACTIONS.

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or correspond-

ing declaratory relief with respect to the class as a whole;
or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any

member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and

that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX D.

United States Court of Appeals,
Tenth Circuit.

January Term, 1968.

The Gas Service Company,

Appellant,

v.

Otto R. Coburn, on behalf of himself and
all others similarly situated,

Appellee.

No. 9635.

Appeal from the United States District Court
for the District of Kansas.

Gerrit H. Wormhoudt (Robert L. Coleman, Kirke W. Dale and Paul R. Kitch were with him on the brief) for Appellant.

William V. Crank (D. Arthur Walker, Richard E. Cook, George B. Collins, Robert Martin, K. W. Pringle, Jr., W. F. Schell, Robert M. Collins, W. L. Oliver, Jr., Tom C. Triplett, Thomas M. Burns and Peter J. Wall were with him on the brief) for Appellee.

Before Woodbury*, Lewis and Hickey, Circuit Judges.

Lewis, Circuit Judge.

This is an interlocutory appeal authorized in compliance with 28 U. S. C., § 1292 (b), to allow appellate con-

* Of the First Circuit, sitting by designation.

sideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption outside the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding \$10,000, and that such individual claims are variable in amount¹ but would aggregate to more than \$10,000.

The trial court found, and it seems indisputable, that plaintiff's action definitely meets each prerequisite to a

¹ By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was \$7.81.

class action as presently set out in Rule 23 (a) and one or more of the additional requirements of 23 (b).² The class

² The amended Rule 23 provides in part:

“(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the liti-

is numerous, a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common," this action under Rule 23 before amendment³ would not have been classified as a "true" class action and aggregation of claims would not have been permitted. See *Aetna Ins. Co. v. Chicago, Rock Island & Pac. R. R.*, 10 Cir., 229 F. (2) 584. The Fifth Circuit in *Alvarez v. Pan American Life Ins. Co.*, 375 F. (2) 992, has held that this result is

gation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

³ The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

still dictated after adoption of the new rule. Citing *Clark v. Paul Gray, Inc.*, 306 U. S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,⁴ the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F. (2) at 905. We must respectfully disagree.

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In *Gibbs v. Buck*, 307 U. S. 66, 72, the Supreme Court stated it thus:

"... federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.⁵ The Advisory Com-

⁴ "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

⁵ *Clark v. Paul Gray, Inc.*, 306 U. S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the

mittee's Note, 39 F. R. D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true", "hybrid", and "spurious". "In practice", said the Committee, "the terms 'joint', 'common', etc., which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true", "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in *Provident Bank v. Patterson*, U. S., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensable parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under any circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been

factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

answered in the affirmative, *Gibbs v. Buck, supra*, and it follows, under the new rule that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy.⁶

The judgment is affirmed and the cause remanded for further proceedings.

⁶ Professor Wright considers this to be a realistic view. He states:

"The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."

APPENDIX E.

**Jose Aramis Alvarez, Individually, and in Behalf
of All Those Similarly Situated, Appellant,**

v.

Pan American Life Insurance Company, Appellee.

**Augustin Goytisblo Recio, Individually, and in Behalf
of All Those Similarly Situated, Appellant,**

v.

Pan American Life Insurance Company, Appellee.

Nos. 22761, 22902.

United States Court of Appeals, Fifth Circuit.

March 27, 1967.

Diversity cases brought as class actions against insurer for relief for plaintiffs and other Cuban refugees similarly situated. The United States District Court for the Southern District of Florida, Charles B. Fulton, Chief Judge, dismissed both actions under diversity statute for lack of jurisdictional amount, and cases were consolidated for appeal. The Circuit Court, Griffin B. Bell, Circuit Judge, held, *iter alia*, that actions by insureds on behalf of themselves and other Cuban refugees similarly situated based on claims that a perseverance bonus had accrued under policies, despite allegations and prayer directed against insurer's assets and alleging a refusal of contract voting rights, were actions for separate sums due plaintiffs and others of asserted classes, and such separate claims could not be aggregated to make jurisdictional amount required under diversity statute, even if new rule 23 relating to class actions were applied.

Affirmed.

1. Courts Key 328 (4)

New rule 23, adopted July 1, 1966, relating to class actions, did not abrogate well-settled principle that separate and distinct claims may not be aggregated to make jurisdictional amount in diversity case even in a class action. Fed. Rules Civ. Proc. rule 23, 28 U. S. C. A.; 28 U. S. C. A., § 1332.

2. Courts Key 328 (4)

Actions by insureds on behalf of themselves and other Cuban refugees similarly situated based on claims that a perseverance bonus had accrued under policies, despite allegations and prayers directed against insurer's assets and alleging refusal of contract voting rights, were actions for separate sums due plaintiffs and others of asserted classes, and such separate claims could not be aggregated to make jurisdictional amount required under diversity statute, even if new rule 23 relating to class actions were applied. Fed. Rules Civ. Proc. rule 23, 28 U. S. C. A.; 28 U. S. C. A., § 1332.

3. Courts Key 328 (4)

Where claims of respective members of asserted class were several and distinct, each was required to establish a requisite jurisdictional amount under diversity statute in order for his action to lie. Fed. Rules Civ. Proc. rule 23, 28 U. S. C. A.; 28 U. S. C. A., § 1332.

Joseph A. McGowan, Carey, Terry, Dwyer, Austin, Cole & Stephens, Miami, Fla., for appellants.

Sam Daniels, James A. Dixon, Dixon, DeJarnette, Bradford, Williams, McKay & Kimbrell, Miami, Fla., for appellee.

Before Wisdom, Bell and Godbold, Circuit Judges.

Bell, Circuit Judge.

These diversity cases, consolidated for appeal, were brought as class actions under old Rule 23, F. R. Civ. Procedure. Alvarez and Recio claimed relief for themselves and other Cuban refugees similarly situated, against appellee, a mutual insurance company. Both actions were dismissed under the diversity statute for lack of the jurisdictional amount. 28 U. S. C. A., § 1332. These appeals followed.

[1] We affirm. In so doing we conclude that new Rule 23, adopted July 1, 1966, is applicable to these cases. However, we hold further that this rule is of no avail to appellants as it does not abrogate the well settled principle that separate and distinct claims may not be aggregated to make the jurisdictional amount even in a class action.

Although the cases differ factually, the aggregation principle is dispositive in both cases. Recio owned an insurance contract issued by appellee in the amount of \$1,000.00. The Castro government expropriated appellee's assets in Cuba and, for this reason, payment on the contract in question was refused. Recio sued appellee in the Florida state courts and recovered all benefits then due under the contract. His federal suit is based on a claim that a perseverance bonus accrued later under the contract. His suit was for the amount due him, less than three hundred dollars, and such sums as were due other Cuban Nationals holding contracts with similar bonus provisions. The class was said to include more than five thousand such contract holders. The bonus clause required an annual payment of from two to six dollars into a fund to be paid only to those who lived for twenty years, i. e., those who persevered.

Alvarez was the holder of an insurance contract with appellee in the amount of \$5,000.00. He sought his con-

tract rights and those of all other Cuban National policy-holders similarly situated. He alleged that appellee had denied him all benefits due under the contract including loan and cash surrender values.

[2] Apparently aware of the principle that separate claims may not be aggregated, the tenor of the complaint was directed toward the insurance company assets from which the bonus payments would be made, in the case of Recio; and toward the assets as well as other contract rights such as voting, in the case of Alvarez. Recio alleged a conversion of the perseverance fund, sought the appointment of a receiver, an accounting, and to impress the fund with a trust. He did not specifically seek the sum due him but the record shows without dispute that he had never requested anything more of the insurance company than such sum as might be due him under the bonus plan. We hold that he was seeking the sum due him and such sums as may have been due others of the asserted class similarly situated.

Alvarez alleged a conversion of the total of the sums due all Cuban Nationals in the class, and a refusal to extend voting privileges due under a mutual insurance contract to him and his class. He sought an accounting, and an injunction requiring that appellee re-establish his interest and that of the class on its books, and that all claims be honored. This too was nothing more than a claim on behalf of each contract holder in the class for whatever might be due under the respective contracts.

The separateness of the claims of each contract holder is established by the case of *Troup v. McCart*, 5 Cir., 1956, 238 F. 2d 289, a class action, where prayers substantially as these were treated, by giving effect to substance over form, as a prayer for payment of sums due under individual insurance contracts. That case, in turn, rested on *Eberhard v. Northwestern Mutual Life Ins. Co.*, 6 Cir.,

1917, 241 F. 353; and *Andrews v. Equitable Life Assur. Soc.*, 7 Cir., 1941, 124 F. 2d 788, both of which involved prayers of the same nature. These cases all stand for the proposition that rights due under an insurance contract are those of creditor and debtor, and are several and distinct from claims which other contract holders may have against the same insurance company. The claims of the separate contract holders are not related to or dependent upon each other. Each case holds that the separate claims may not be aggregated to make the jurisdictional amount required under the diversity statute, § 1332, *supra*. See also *Matlaw Corporation v. War Damage Corporation*, 7 Cir., 1947, 164 F. 2d 281; and *Knowles v. War Damage Corporation*, 1948, 83 U. S. App. D. C. 388, 171 F. 2d 15.

These holdings are in accord with the long line of Supreme Court decisions to the effect that separate and distinct demands of two or more plaintiffs, unlike several plaintiffs uniting to enforce a right or title which they hold in common, may not be aggregated to make the jurisdictional amount. *Lion Bonding & Surety Co. v. Karatz*, 1923, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871; *Pinel v. Pinel*, 1916, 240 U. S. 594, 36 S. Ct. 416, 60 L. Ed. 817; *Troy Bank of Troy, Ind. v. G. A. Whitehead & Company*, 1911, 222 U. S. 39, 32 S. Ct. 9, 56 L. Ed. 81; *Clay v. Field*, 1891, 138 U. S. 464, 11 S. Ct. 419, 34 L. Ed. 1044; *Stratton v. Jarvis & Brown*, 1834, 8 Peters (33 U. S.) 4, 8 L. Ed. 846. See also *Alfonso v. Hillsborough County Aviation Authority*, 5 Cir., 1962, 308 F. 2d 724; and 1 *Moore's Federal Practice* (2nd ed.), pp. 889-893; 1 *Barron & Holtzoff, Federal Practice and Procedure* (Wright ed.), pp. 114-117; and 2 *Barron & Holtzoff, Federal Practice and Procedure* (Wright ed.), pp. 321-324.

Appellants would avoid this jurisdictional obstacle by asserting Rule 23, F. R. Civ. P., as a jurisdictional base in each case. They properly read old Rule 23 as per-

mitting aggregation if there is a true class action but their contentions that these were such actions were overruled in the District Court. *Alfonso v. Hillsborough County Aviation Authority*; *Troop v. McCart*; and *Knowles v. War Damage Corporation*, all *supra*, support the District Court in this respect. Each teaches that these were spurious class actions under 23 (a) (3); hence aggregation was not in order. We need not dwell on this problem, however, since we are of the view that it would not be inappropriate to apply new Rule 23 and we will apply it *arguendo*. The new rule has discarded the trichotomy developed under the old rule of treating class actions as either true, hybrid, or spurious.

There is a sound basis for applying new Rule 23. On February 28, 1966, the Supreme Court entered its adopting order which included new Rule 23. That order provided in pertinent part:

"That the foregoing amendments . . . to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies." 384 U. S. 1029, 1031 (1966).¹

The Advisory Committee's Note on the new rules, 39 F. R. D. 98, points out that the true category, rule 23 (a) (1), under old Rule 23² was defined as involving joint,

¹ On the application of the injustice test, cf. *Klapprott v. United States*, 1949, 335 U. S. 601, 69 S. Ct. 384, 93 L. Ed. 266.

² Old Rule 23:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all

or common, or secondary rights; the hybrid category, rule 23 (a) (2), as involving several rights related to specific property; and the spurious category, rule 23 (a) (3), as involving rights affected by a common question and related to common relief. The new rule³ reflects an aban-

before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is,

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

³ New Rule 23 (384 U. S. 1039, 1047 (1966)), is as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or sub-

donment of the nature of the right concept for a more pragmatic approach. The new rule looks to such practical considerations as common questions of law or fact, the risk of inconsistent adjudications, the desirability of concentrating litigation in a particular forum, and the difficulties to be encountered in managing the action. See Advisory Committee's Note, 39 F. R. D. 98, *supra*; and Cohn, "The New Federal Rules of Civil Procedure", 54 Geo. L. J. 1204 (1966).

Notwithstanding that we have assumed, *arguendo*, that the new rule is applicable, the question of jurisdictional amount still exists unless the new rule has somehow abrogated the aggregation principle. We have found no authority for so holding, and we cannot assume that federal jurisdiction has been expanded in such a *sub silentio* manner. Since the inception of federal diversity jurisdiction, Congress has imposed a jurisdictional amount require-

stantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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ment. In § 11 of the Judiciary Act of 1789, the jurisdiction of the federal courts in diversity cases was limited to controversies in which the amount involved exceeded the sum of \$500.00. 1 Stat. 73, 78. In the interim the jurisdictional amount requirement has been continually enlarged to the present amount of \$10,000.00.⁴ In contrast, it was not until June 19, 1934, that Congress gave the Supreme Court power to enact rules of civil procedure for the federal courts. 28 U. S. C. A. § 723c, now 28 U. S. C. A. § 2072. Shortly thereafter, the Supreme Court made it clear that the delegation of rule making power to the court did not authorize the expansion or restriction of jurisdiction conferred by statute.⁵ This limitation is expressed in Rule 82, F. R. Civ. P. (as amended, effective July 1, 1966), which provides:

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts * * *." 384 U. S. 1029, 1068.

Professor Moore has described the class action as nothing more than " * * a procedural device to permit some to prosecute or to defend an action without the necessity of all appearing as plaintiffs or defendants." 3 Moore's Federal Practice (2nd ed.), p. 3480. This statement was

⁴ In 1887 the amount was increased to \$2,000, 24 Stat. 552; in 1911 to \$3,000, 36 Stat. 1087, 1091; and in 1958 diversity jurisdiction was limited to cases where the matter in controversy exceeded the sum of \$10,000. 72 Stat. 415.

⁵ In *Sibbach v. Wilson & Co.*, 1941, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, the court said:

"Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. * * * There are * * * limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute."

made in support of his view that the aggregation principle was applicable in full force to class actions brought under old Rule 23. Aggregation was proper, he stated, where the claim was joint or common, as in the true category, but not where there were several or separate claims as in hybrid or spurious class suit. This treatise law is in line with the decisions. As examples, in addition to *Alfonso v. Hillsborough County Aviation Authority*; and *Troup v. McCart*, both *supra*, the court in *Steele v. Guaranty Trust Co. of New York*, 2 Cir., 1947, 164 F. 2d 387, described a proceeding under Rule 23 (a) (3) as “* * * in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements.” In *Sturgeon v. Great Lakes Steel Corporation*, 6 Cir., 1944, 143 F. 2d 819, a spurious class action, the court pointed out that the class action rule does not broaden the jurisdiction of the federal courts in diversity of citizenship cases, citing old Rule 82, F. R. Civ. P., which provided that the rules were not to be construed to extend or limit the jurisdiction of the District Court. The holding of these cases is no different from that of the Supreme Court in *Clark v. Paul Gray*, 1939, 306 U. S. 583, 59 S. Ct. 744, 83 L. Ed. 1001, where the court raised the question of jurisdictional amount on its own motion and concluded that only one of several plaintiffs had made a showing of the requisite amount in controversy, and that the jurisdictional amount was necessary in the case of each of the plaintiffs where they asserted separate and distinct demands as distinguished from a joint or common interest in a single suit. The District Court was directed to dismiss as to all plaintiffs, save the one, for want of the jurisdictional amount.

In sum, it would appear that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule making power delegated to the Supreme Court by Congress. It follows that the principle is valid and subsisting not-

withstanding new Rule 23.⁶ This conclusion is a recognized limitation on the full utility of the class action procedure in federal courts where some members of the class have claims in the jurisdictional amount and some do not. However, the law seems clear and an accommodation of jurisdiction to the class action procedure, if deemed necessary, is a question which addresses itself to the Congress or the Supreme Court.

[3] There is one last matter which should be mentioned. After appellee moved to dismiss the Alvarez case for lack of the jurisdictional amount, Mr. Alvarez called to the court's attention that another member of the class had a contract with appellee in the amount of \$25,000. This suggestion is of no help to Mr. Alvarez or the class but it would enable this member of the class, just as was true in *Clark v. Paul Gray*, *supra*, to maintain his separate action, assuming the necessary amendment in the District Court. As we have noted, where, as here, the claims of the respective members of the class are several and distinct, each must establish the requisite amount for his action to lie. See 1 Barron & Holtzoff, *Federal Practice and Procedure*, (Wright ed.), pp. 114-117, and 2 Barron & Holtzoff, pp. 321-324. Cf. *Eagle Star Insurance Company v. Maltes*, 5 Cir., 1963, 313 F. 2d 778.

The judgment of dismissal in each case, as it relates to a class action, is

Affirmed.

⁶ Cf. caveat in Cohn, *The New Federal Rules of Civil Procedure*, *supra*, p. 1221, fn. 73. Professor Wright in the supplement, p. 89, to 2 Barron & Holtzoff, *Federal Practice and Procedure* (Wright ed.), § 569, entertains the hope that the decision will be otherwise.



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SUPREME COURT, U. S.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1968

No.

117

**THE GAS SERVICE COMPANY,
*Petitioner,***

vs.

**OTTO R. COBURN, on Behalf of Himself and
All Others Similarly Situated,
*Respondent.***

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. _____

THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and
All Others Similarly Situated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Comes now The Gas Service Company, a public utility, incorporated under the laws of the State of Delaware, authorized to do business in the State of Kansas, and petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming an order of the United States District Court for the District of Kansas, which order overruled petitioner's motion to dismiss for lack of federal jurisdiction.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. A1-A6) is reported at 389 F. 2d 831. The opinion of the district court (App. B, *infra*, pp. A9-A17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1968 (App. A, *infra*, p. A7). Petitioner's Petition for Rehearing and Application for Hearing En Banc thereof were denied on March 26, 1968 (App. A, *infra*, p. A8). The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether under Rule 23, *Federal Rules of Civil Procedure*, as amended in July, 1966, aggregation of several and distinct claims is now permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. §1332, when aggregation was not allowed prior to such amendment?

STATUTE AND RULES INVOLVED

28 U.S.C. 1332 provides in pertinent part as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

* * *

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in

the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Amended Rule 23 of the *Federal Rules of Civil Procedure* is set forth in full in Appendix C, pp. A20-A23.

Rule 82 of the *Federal Rules of Civil Procedure*, as amended February 28, 1966, effective July 1, 1966, provides in pertinent part as follows:

"These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein. * * *"

STATEMENT

An appeal was allowed by the court below from an order of the United States District Court for the District of Kansas, overruling petitioner's motion to dismiss a class action. The motion attacked the complaint for insufficiency of the jurisdictional amount required by 28 U.S.C. 1332, as amended (R. 5)*

Respondent Otto R. Coburn, the only named plaintiff, resides in the vicinity of Arkansas City, Kansas. The petitioner is a Delaware corporation authorized to do business in Kansas. It markets natural gas to residents of the State of Kansas, including respondent Coburn. The complaint alleges that Coburn and other persons exceeding 18,000 in number reside outside of the city limits of various cities in the State of Kansas, and that he and

*"R." refers to the Xerox record in the court of appeals transmitted from the district court.

other members of this class have purchased natural gas from petitioner continuously since 1954 (R. 1-2).

Complaint is made that petitioner has individually billed and collected from Coburn and other members of the class an illegal municipal franchise tax in addition to the proper rates payable otherwise. The complaint further alleges that the exact amount of the unlawful charges collected from all members of the class is unknown, but that the aggregate total of such illegal charges which respondent seeks to recover for the class far exceeds the sum of \$10,000 (R. 3).

Petitioner moved to dismiss in the district court on the ground that the complaint failed to satisfy the \$10,000 jurisdictional amount required by 28 U.S.C. 1332. The motion to dismiss was accompanied by an affidavit showing that the total franchise tax collected from respondent Coburn from April, 1964 through February, 1966 amounted to \$7.81. At the hearing on petitioner's motion to dismiss, it was stipulated that counsel for respondent were not aware at that time of any member of the class whose individual claim would equal or exceed \$10,000 (R. 5, 7-8, 18).

The trial court issued a memorandum in which it directed that an order be prepared and filed overruling appellant's motion to dismiss (R. 9-18). In its order of June 23, 1967, overruling the motion, the district court authorized an interlocutory appeal under 28 U.S.C. 1292(b). Timely application therefor was made, and leave to appeal was granted by the circuit court on July 26, 1967 (R. 19, 20).

The circuit court concisely stated the issue here involved as follows:

"The determinative question is whether under Rule 23, Fed. R. Civ. Pr., as amended in July 1966, aggrega-

tion of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. §1332 where a class action under the amended rule is otherwise appropriate." (App. A, p. A2).

The court below answered the question in the affirmative, after conceding that aggregation of the claims here involved was not permissible under former *Rule 23*.¹ It specifically declined to follow the holding in *Alvarez v. Pan American Life Insurance Co., et al.*, 5 Cir., 375 F. 2d 992, certiorari denied, 389 U.S. 827, that the amendment to *Rule 23* had no effect upon jurisdiction. In its petition for rehearing, which was denied, ^{Petitioner} ~~respondent~~ called attention to the apparent conflict between the decision herein and decisions of this Court and with the language of this Court in amended *Rule 82* of the *Federal Rules of Civil Procedure* (C.R.² 6, 10).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below, that claims under amended *Rule 23* may now be aggregated to satisfy the jurisdictional amount required in diversity cases, was explicitly recognized as in direct conflict with the decision of the Court of Appeals for the Fifth Circuit in *Alvarez v. Pan American Life Insurance Co., et al.*, *supra*. There, as in the present case, a class action was pleaded and the plaintiffs contended that under amended *Rule 23* their claims, although separate and distinct, should be aggregated in order to satisfy jurisdictional amount. The Court of Appeals of the Fifth Circuit carefully considered the con-

1. "Because the claims of the individuals constituting the class in the case at bar are neither 'joint' nor 'common' this action under *Rule 23* before amendment would not have been classified as a 'true' class action and aggregation of claims would not have been permitted. * * *." (App. A, p. A4).

2. "C.R." refers to the certiorari record transmitted from the court below.

tention and concluded with the following pertinent language:

"In sum, it would appear that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule making power delegated to the Supreme Court by Congress. It follows that the principle is valid and subsisting notwithstanding new Rule 23. This conclusion is a recognized limitation on the full utility of the class-action procedure in federal courts where some members of the class have claims in the jurisdictional amount and some do not. However, the law seems clear and an accommodation of jurisdiction to the class action procedure, if deemed necessary, is a question which addresses itself to the Congress or the Supreme Court." 375 F.2d 996.

Certiorari was denied in the *Alvarez* case prior to the decision herein, 389 U.S. 827. With respect to the holding in *Alvarez* the court below squarely said, "*We must disagree*" (emphasis ours) (App. A, p. A5). Four days after the decision herein, the Court of Appeals for the Eighth Circuit in *Snyder v. Harris*, 390 F.2d 204, held that aggregation is not permitted under amended Rule 23, relying upon the *Alvarez* case and the opinion of the trial court, 268 F. Supp. 701 (U.S.D.C., E.D. Mo. 1967).

As the matter now stands, litigants filing under the federal system may aggregate claims in class actions in Kansas City, Kansas, but may not do so in Kansas City, Missouri. The uncertainty created by the conflicting standards among circuits necessarily places in jurisdictional limbo all pending and prospective class suits in the United States district courts in which aggregation of claims is necessary to satisfy 28 U.S.C. 1332. Further proceedings in the instant case may be an exercise in futility unless the jurisdictional question is first resolved.

2. The holding of the court below is in conflict with decisions of this Court and with its admonition expressed

in amended Rule 82 of the *Federal Rules of Civil Procedure*, that the rules are not to be construed to extend federal jurisdiction. Although this Court has not yet had occasion to pass upon the effect of amended Rule 23, the identical questions of policy and of law were considered in *Sibbach v. Wilson & Co.*, 312 U.S. 1 and in *United States v. Sherwood*, 312 U.S. 584 at 589-590. See also, *Clark v. Paul Gray*, 306 U.S. 583; *Gibbs v. Buck*, 307 U.S. 66. In *Sibbach*, the Court marked out the limitations upon its rule making authority as follows:

"Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge nor modify substantive rights,' in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. *There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.*" 312 U.S. at page 10 (Emphasis ours)

In *Clark v. Paul Gray*, *supra*, a class action, the Court said:

"It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements. *Wheless v. St. Louis*, 180 U.S. 379, 45 L. ed. 583, 21 S. Ct. 402; *Rogers v. Hennepin County*, 239 U.S. 621, 60 L. ed. 469, 36 S. Ct. 217; *Pinel v. Pinel*, 240 U.S. 594, 60 L. ed. 817, 36 S. Ct. 416; *Scott v. Frazier*, 253 U.S. 243, 64 L. ed. 883, 40 S. Ct. 503. * * *

306 U.S. 583 at 589.

3. The implications of the decision below reach beyond the provisions of amended *Rule 23*. The 1966 amendments to the *Federal Rules of Civil Procedure* make substantial changes in *Rules 18, 19 and 20*, all dealing with joinder of claims or of parties. If, as the court below in effect concluded, considerations germane to judicial administration are to override statutory jurisdictional standards in the application of amended *Rule 23*, then the same considerations should, with any consistency, govern all provisions in the *Rules* dealing with the joinder of claims and of parties.

CONCLUSION

Because the decision rendered below creates a conflict between the circuit courts of appeal, decides a federal question in a way in conflict with applicable decisions of this Court, and decides an important question of federal law which has not been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

January Term, 1968

THE GAS SERVICE COMPANY,
Appellant,

vs.

OTTO R. COBURN, on behalf of
himself and all others similarly
situated,

Appellee.

No. 9635

Appeal from the United States District Court for the
District of Kansas

Gerrit H. Wormhoudt (Robert L. Coleman, Kirke W. Dale and Paul R. Kitch were with him on the brief) for Appellant.

William V. Crank (D. Arthur Walker, Richard E. Cook, George B. Collins, Robert Martin, K. W. Pringle, Jr., W. F. Schell, Robert M. Collins, W. L. Oliver, Jr., Tom C. Triplett, Thomas M. Burns and Peter J. Wall were with him on the brief) for Appellee.

Before WOODBURY*, LEWIS and HICKEY, Circuit Judges.

LEWIS, Circuit Judge.

*Of the First Circuit, sitting by designation.

This is an interlocutory appeal authorized in compliance with 28 U.S.C. § 1292(b), to allow appellate consideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. § 1332 where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption outside the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding \$10,000, and that such individual claims are variable in amount but would aggregate to more than \$10,000.

1. By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was \$7.81.

The trial court found, and it seems indisputable, that plaintiff's action definitely meets each prerequisite to a class action as presently set out in Rule 23(a) and one or more of the additional requirements of 23(b).² The class is numerous, a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be

2. The amended Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: **(A)** the interest of members of the class in individually controlling the prosecution or defense of separate actions; **(B)** the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; **(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; **(D)** the difficulties likely to be encountered in the management of a class action."

adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment³ would not have been classified as a "true" class action and aggregation of claims would not have been permitted. See *Aetna Ins. Co. v. Chicago Rock Island & Pac. R.R.*, 10 Cir., 229 F.2d 584. The Fifth Circuit in *Alvarez v. Pan American Life Ins. Co.*, 375 F.2d 992, has held that this result is still dictated after adoption of the new rule. Citing *Clark v. Paul Gray, Inc.*, 306 U.S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,⁴ the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F.2d at 995. We must respectfully disagree.

3. The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

4. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In *Gibbs v. Buck*, 307 U.S. 66, 72, the Supreme Court stated it thus:

"... federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.⁵ The Advisory Committee's Note, 39 F.R.D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true," "hybrid," and "spurious." "In practice," said the Committee, "the terms 'joint,' 'common,' etc. which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted.

5. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in *Provident Bank v. Patterson*, U.S., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensible parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, *Gibbs v. Buck*, *supra*, and it follows, under the new rule, that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy.⁶

The judgment is affirmed and the cause remanded for further proceedings.

6. Professor Wright considers this to be a realistic view. He states:

"The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement...."

JANUARY TERM, FRIDAY, FEBRUARY 23rd, 1968.

Before Honorable Peter Woodbury, Honorable David T. Lewis and Honorable John J. Hickey, Circuit Judges.

The Gas Service Company,

Appellant,

9635

vs.

Otto R. Coburn, on behalf of himself
and all others similarly situated,
Appellee.

} Appeal from the
United States Dis-
trict Court for the
District of Kansas.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings.

MARCH TERM, TUESDAY, MARCH 26th, 1968.

Before Honorable Peter Woodbury, Honorable David T.
Lewis and Honorable John J. Hickey, Circuit Judges.

Gas Service Company, a Delaware
corporation,

Appellant,

9635

vs.

Otto R. Coburn, on behalf of himself
and all others similarly situated,
Appellee.

} Appeal from the
United States Dis-
trict Court for the
District of Kansas.

This cause came on to be heard on the petition of ap-
pellant for a rehearing herein and was submitted to the
court.

On consideration whereof, it is ordered by the court
that the said petition for rehearing be and the same is hereby
denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

OTTO R. COBURN, et al.,	} No. T-4172
Plaintiff,	
vs.	
GAS SERVICE COMPANY,	
Defendant.	

Memorandum and Order

Plaintiff Coburn, a citizen of Kansas, on behalf of himself and all others similarly situated, brought this action against defendant Gas Service Company, a Delaware Corporation, with principal offices and place of business in Kansas City, Missouri, alleging that the amount in controversy exceeds \$10,000, and that defendant markets gas to citizens of Kansas having their residence and burner-tip outlets outside the city limits of various cities in the State of Kansas, and that plaintiff is one of the defendant's customers so situated. It is further alleged that the persons constituting the class similarly situated with plaintiff exceed 18,000 in number and are so numerous that the joinder of all members is impracticable; that there are questions of law and fact in this action common to the class; the claim of the plaintiff is typical of the claims of other members of the class; and the prosecution of this action by the plaintiff will fairly and adequately protect the interests of the class. It is further alleged that there exists one or more of the conditions described in sub-divisions (1), (2) and (3) of Rule 23(b), Federal Rules of Civil Procedure, and by reason thereof the action is properly brought by the plaintiff as a class action.

It is further alleged that plaintiff along with the other members of the class have purchased natural gas from defendant for consumption outside of the city limits of any incorporated city and that defendant has charged them, billed them and has been paid for a large volume of natural gas consumed; that the charges included, and plaintiff and other members of the class have been compelled to pay, an additional charge designated as a "franchise tax"; that the billing and collection of the apportioned amount of said tax to the plaintiff and those in his class is unlawful and unauthorized because such "franchise tax" are revenues or duties on city franchise rights of defendant which it has arbitrarily extended and charged to customers at points outside the city limits; it is further alleged that the amount of unlawful charges collected by defendant from plaintiff and members of the class is in excess of the jurisdictional amount of \$10,000; plaintiff prays that the Court determine this to be a class action properly instituted under Rule 23 of F.R.C.P.

Defendant has filed a motion to dismiss on the grounds that plaintiff's complaint predicates jurisdiction upon 28 U.S.C. §1332 which requires that an action between citizens of different states, the amount in controversy shall exceed the sum of \$10,000 exclusive of interest and costs. Attached to the motion and made a part of it is the affidavit of an officer of the defendant corporation stating that plaintiff Coburn's pro rata share of franchise tax from April 1964 to February 1966 inclusive, amounts to \$7.81. No challenge is made of plaintiff's contention that the total amount so collected and received by defendant from all members of the class exceeds the sum of \$10,000.00. Defendant further alleges that for purposes of determining the amount in controversy herein the claim of the plaintiff cannot be aggregated with the claims of any other persons similarly situated.

Thus, brought into sharp focus is the question of whether the amounts claimed to be recoverable by the class, in event plaintiff's claim is sustained for the class, may be aggregated for the purpose of sustaining the Court's jurisdiction.

The action is sought to be maintained under Rule 23 of the Federal Rules of Civil Procedure as amended, which amendment became effective July 1, 1966. This Court has endeavored to get a fair statement of reasons for changing the rule, but after considerable research concludes that the Advisory Committee's note found at 39 F.R.D. 98 describes the terms used by the Court as a basis for classification of various kinds of class action and states that they proved to be obscure and uncertain and so an amended rule describing "in more practical terms the occasion for maintaining class actions" and providing that all class actions maintained to the end as such will result in judgments including those whom the Court finds to be members of the class, whether or not the judgment is favorable to the class, and refers to the measures which can be taken to assure the fair conduct of these actions.

Whether the situation has been improved by the establishment of amended Rule 23 remains to be seen. The problem presented in this case remains to be spelled out.

The Advisory Committee observed that the categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true category" was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights relating to "specific property"; and the "spurious" category, as involving "several" rights effected by a common question and related to common relief. It was thought that the definitions accurately de-

scribed the situations amenable to the "class suit device" and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. The Committee also observed that in practice the terms "joint", "common", etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain, and that the Courts had considerable difficulty with these terms. It was further observed that the Rule did not provide an adequate guide to the proper extent of judgments in class actions.

It was noted by the Committee that the original Rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class.

The Court's research on this problem includes its consideration of the statement by Professor Wright found on page 89 of the 1966 pocket part to Volume 2, Barron & Holzoff's Federal Practice and Procedure, wherein he discusses directly the problem now before the Court. He says:

"The greatest difficulty comes with regard to jurisdictional amount. As a function of the general principle that aggregation is permitted by parties jointly or commonly interested, but not where claims are several and distinct, it was held under the former rule that aggregation of the claims of all members of the class was permitted in 'true' class action, where the rule required a 'joint' or 'common' interest, but not in 'hybrid' or 'spurious' class action. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on

the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversy'. A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached.

"If the Courts continue to apply the ancient learning, it will be necessary to consider in each case, in which the claims of the named representatives are not themselves for more than \$10,000, whether the interests involved are 'joint' or 'common', an inquiry which is frequently quite difficult and which it was a purpose of the amended rule to avoid. If the interests are joint or common, then the relation of the parties will be such that their action would fall under (b) (1), but it does not follow that all (b) (1) actions will involve joint or common interests."

Before the amendment to Rule 23, a class action brought on behalf of numerous persons having a *joint or common interest* or *title* in the subject matter of the suit could, where the value of the interest involved exceeded the jurisdictional amount, be maintained in a Federal District Court. *Clark v. Paul Gray, Inc.*, 306 F.2d 323, *Bolsenberg v. Chicago Title & Trust Company*, 128 F.2d 245, Anno. 141 A.L.R. 565.

On the other hand, where the right exists in favor of many as against one, or in favor of one as against many, and in its nature is separable, then the separable values could not be added together to make the jurisdictional sum, and the separable value furnished the jurisdictional test. *Elliott v. Empire Natural Gas Co.*, 4 F.2d 493, 497, *Clark v. Paul Gray, Inc.*, (supra).

It is reasonable to conclude that the able and competent persons who were responsible for the change in Rule 23, had in mind some improvement in the utilization of the Federal Rules of Civil Procedure as now formulated and adopted, presumably their recommendations were considered by the Supreme Court of the United States, else the amended rule would not have been adopted. Clearly, the defects of the prior rule were to be eliminated.

To adopt the position urged by defendant here has the effect of nullifying what this Court believes is the object and purpose of the amended rule. As this Court views the situation, if defendant's theory is adopted, plaintiff here and those situated with him are limited to the permissive joinder authorized by Rule 20. Surely, the distinguished members of the advisory committee, not to mention the Supreme Court, had something other than this in mind when Rule 23 was modified, otherwise Rule 23 as a practical matter could have been eliminated.

The revisors of the rule acknowledged the difficulty encountered in the use of such terms as "joint", "common" or "secondary" and these features were eliminated from the new rule. Likewise if the Committee's note is to be given any weight, the distinctions of "true", "spurious" and "hybrid" class actions were removed. This is borne out by the statement on page 100 of 39 F.R.D.,

"The difficulties which would arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device."

And this is submitted in connection with the statement (p. 103) that in cases where the Court finds that the questions common to the class predominate over the questions affecting individual members that economies can be achieved by the class-action device.

In the case at bar the questions presented would be common to the class. There is no conceivable question that could otherwise predominate here. The Court can see no obstacle to a finding that the questions common to the class predominate over the questions affecting individual members. Furthermore, the conditions required by Rule 23 appear to exist under the allegations in the complaint.

Defendants place their reliance upon the case of *Matzen v. Socony Mobil Oil Company, Inc.*, case W-3426 (unreported), where the Court held that claims united in a class action which are not joint but which, in fact, are separate claims of the individual persons, cannot be aggregated to sustain removal from state court. The rule announced in *Matzen* follows the decision of the Tenth Circuit Court of Appeals in *Aetna Insurance Company v. Chicago, Rock Island & Pacific Railroad Co.*, 229 F.2d 584, a case decided before Rule 23 was amended. Significantly, the *Matzen* opinion reads:

"We hold that aggregation in class suits must be determined by the principles which have heretofore governed aggregation in non-class suits. The claims must be not only common in the sense of a community of interest in the rights asserted, they must be undivided in the sense that they constitute in their totality an integrated right."

The above statement is the correct statement of law, as it existed before Rule 23 was amended. If it be declared the law under amended Rule 23, then there was no purpose in amending the rule for the reasons given by the revisors.

This Court has studied the opinion in the case of *Alvarez et al. v. Pan American Life Insurance Company*, No. 22902, March 27, 1967, decided by the Fifth Circuit Court of Appeals, a copy of which was furnished to the

Court by defendant's counsel. It is fairly obvious that if the law announced in *Alvarez* is to be followed, then amended Rule 23 serves little useful purpose. To support the law announced, the Fifth Circuit was required to fall back on the classifications developed under former Rule 23, now condemned and rescinded.

To sustain *Alvarez*, the Court found it necessary to conclude that Rule 82 furnishes the basis for rejecting jurisdiction under Rule 23. It says:

"These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts..."

The Fifth Circuit then falls back on interpretations applied to the jurisdictional problems by the Courts in dealing with "true", "hybrid", or "spurious" classifications which were eliminated by the amended rule.

If it is to be the law that this Court can entertain a class action only when each member of the class to be bound has a claim for more than the jurisdictional amount, that rule should be clearly announced. Support should not rest on rules developed under the former Rule 23. The new rule seems designed to give the trial court substantial discretion in determining whether at the outset, the action can be maintained and if so, to what extent the judgment rendered shall apply. Rule 23(d) is a broad outline of procedure and provides for orders the Court may make in conducting a class action:

The authors of the amended rule must have taken into account the possibility that the position contended for by plaintiff here would result in an unwarranted extension of federal jurisdiction when they placed in the Committee note the following statement (p. 104):

"The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered..."

The uncertainty of the proper application of present Rule 23 indicates that an early interpretation of it should be clearly made.

The Court will deny the motion of defendant to dismiss for the reason that in the judgment of this Court, none of the grounds stated in the motion to dismiss are sufficient to require dismissal.

The Court will, if application is timely made, permit an appeal to be taken from this order as provided by 28 U.S.C. 1292(b).

Prevailing counsel will prepare, circulate and submit order to be approved and entered by the Court, and which, when entered, shall constitute the order of the Court denying defendant's motion to dismiss.

DATED at Topeka, Kansas this 29th day of May, 1967.

/s/ George Templar
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

OTTO R. COBURN, et al.,

Plaintiffs,

vs.

GAS SERVICE COMPANY, a Dela-
ware Corporation,

Defendant.

Civil Action
No. T-4172

Order

On April 14, 1967, the parties appeared by and through their respective counsel of record and presented oral argument to the court on defendant's motion to dismiss for lack of jurisdiction.

During the course of argument it was stipulated by counsel for the parties that the amount of the plaintiff's claim is less than \$10,000, and that counsel for plaintiff at this time is not aware of any member of the class whom plaintiff seeks to represent whose individual claim would equal or exceed \$10,000.

After hearing argument of counsel, the matter was taken under advisement by the court.

Thereafter, having examined the pleadings, the briefs, and being duly advised in the premises, the court issued its Memorandum and Order on the 29th day of May, 1967, which memorandum having been filed with the clerk is incorporated herein and made a part hereof by reference.

For the reasons set forth in the aforesaid memorandum,

IT IS BY THE COURT ORDERED that defendant's motion to dismiss for lack of jurisdiction should be, and it hereby is, overruled.

The court finds and is of the opinion that the above ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

Upon application timely made, the defendant may appeal from this order as provided in 28 U.S.C. 1292(b).

/s/ George Templar

Approved:

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By /s/ Gerrit Wormhoudt
Attorneys for Defendant

APPENDIX C

**Rule 23, Federal Rules of Civil Procedure, amended
February 28, 1966, effective July 1, 1966****Rule 23. Class Actions**

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1), or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1446.

MARGARET E. SNYDER, Also Known as PEG SNYDER,
Petitioner,

vs.,

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit.

BRIEF

For the Respondents in Opposition.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is reported at 390 F. 2d 204 (8th Cir. 1968). The opinion of the United States District Court for the Eastern District of Missouri (Pet. App. B) is reported at 268 F. Supp. 701 (E. D. Mo. 1967).

JURISDICTION.

The judgment of the Court of Appeals was entered on February 27, 1968 (U. S. C. A., Proceedings, Page 3).¹ Petitioner's Petition for Rehearing, or in the Alternative, to Transfer to the Court En Banc, was denied on March 22, 1968 (U. S. C. A., Proceedings, Page 16). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED.

Whether under Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where aggregation was not permitted prior to the amendment of Rule 23.

¹ The Record of the District Court proceedings will be herein referred to as "R.", and the Record of the proceedings of the Court below, will be referred to as the U. S. C. A. proceedings.

STATEMENT.

On November 23, 1966, petitioner filed her complaint in the United States District Court for the Eastern District of Missouri against respondents and National Western Life Insurance Company (R. 1-5). Petitioner filed an amended complaint against only the respondents on March 14, 1967, as a class action pursuant to Fed. R. Civ. P. 23, as amended July 1, 1966 (R. 9-13).² As stated by the

² Fed. R. Civ. P. 23 (a); (b), as amended provides as follows:

"(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in

District Court, "[t]he relevant part of the amended complaint alleges that the plaintiff, Margaret E. Snyder, is a citizen of the State of Arizona, and the defendants, Charles Harris and Earl W. Kirchhoff are citizens of the State of Missouri; that there is diversity of citizenship and the amount in controversy exceeds \$10,000.00; that since prior to November 22, 1966, the plaintiff has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (hereinafter referred to as Missouri Fidelity) and owns two thousand shares of said company; that the By-laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen directors and that the defendants were at all times relevant to this action members of said board of directors; that at all times relevant to this action the market price of Missouri Fidelity was about \$2.63 per share; that sometime prior to November 22, 1966, National Western Life Insurance Company (hereinafter referred to as National Western) submitted to the directors of Missouri Fidelity a proposal to purchase from them for \$7.00 per share all of the shares of Missouri Fidelity owned by them, conditioned, however, that all directors of Missouri Fidelity, except four, resign as directors and that five nominees of National Western be elected as directors of Missouri Fidelity, and that such nominees be designated and elected as a majority of the executive committee and of the investment committee of Missouri Fidelity; that on or about November 22, 1966, National Western, pursuant to its said offer, entered into an agreement with eight of the directors of Missouri Fidelity, including the defendants herein, to pay to them and to friends and relatives of theirs \$7.00 per share for

individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

an aggregate of approximately 300,000 shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors, including the defendants herein, did resign as directors of Missouri Fidelity, and nominees of National Western were designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity; that the aforesaid conduct and acts of the said eight directors, including the defendants, were a breach of trust and a violation of their duties as directors of Missouri Fidelity; and National Western procured said resignations and therefore paid or has agreed to pay the said eight directors who resigned, including the defendants herein, and their friends and relatives, a premium of about \$1,200,000.00; and that the aggregate amount paid by National Western for the said shares was approximately \$1,200,000.00 in excess of the market value of said shares and was a premium paid by it to the said selling shareholders for the resignations of said directors who resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity.

"The amended complaint prays for judgment in the amount of \$1,200,000.00, said judgment to be entered in favor of the plaintiff and the other individual shareholders (allegedly over 4,000 in number) according to their respective share holdings" (R. 9-13, 16-18). See, 268 F. Supp. 701, 701-02 (E. D. Mo. 1967).

On March 27, 1967, the respondents filed their Motion to Dismiss the amended complaint, alleging as one of their grounds "that the Court lacks jurisdiction as the amount in controversy is less than \$10,000.00" (R. 15).

The District Court dismissed the amended complaint without prejudice on April 27, 1967, holding that the

Court lacked jurisdiction in that the amount in controversy did not exceed \$10,000.00 (R. 16-23).³ In arriving at this decision, the Court ruled that the petitioner could not aggregate her claim with those of others in the class, because the appellant's claim was separate and distinct from other persons in the class, and Rule 23, as amended, in no way purports to affect the jurisdiction of the Court, nor change the character of a plaintiff's right. The District Court further held that to construe Amended Rule 23, so as to confer jurisdiction would constitute a violation of Fed. R. Civ. P. 82 (R. 18-23), 268 F. Supp. 701, 702-704.

The Court of Appeals affirmed the District Court "on the basis of the District Court's soundly reasoned opinion and the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 827 (1967)." In so holding, the Court stated:

"We are not persuaded from our study of amended Rule 23 and the Advisory Committee notes to conclude that the amendment of the Rule was designed or did in fact change the substantive law proscribing the aggregation of separate and distinct claims in a class action for purposes of conferring jurisdiction under Section 1332." 390 F. 2d 204 at 205 (8th Cir. 1968).

After the denial of a Petition for Rehearing, or in the Alternative to Transfer to the Court en Banc (U. S. C. A., Proceedings, Page 16), a petition for a writ of certiorari was docketed in this Court on May 17, 1968, as No. 1446.

³ Petitioner alleged in her complaint that she was the owner of 2,000 shares of stock of Missouri Fidelity; that the market price of the stock at the time of the matters complained of was approximately \$2.63 per share; and that the defendants received \$7.00 per share for their stock. Thus, if petitioner cannot aggregate her claims with those of the other members of the class, the amount in controversy is only \$8,740.00.

ARGUMENT.

The sole question raised by petitioner is whether Fed. R. Civ. P. 23, as amended July 1, 1966, operates so as to permit the aggregation of separate and distinct claims for satisfying the jurisdictional amount. We submit that this issue tendered by petitioner does not warrant further review by this Court. This Court recently denied certiorari in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 827 (1967), a case raising the same question as herein presented.

In **Alvarez**, one appellant owned an insurance contract issued by appellee in the amount of \$1,000.00. The Castro government expropriated appellee's assets in Cuba, and for this reason payment on the contract was refused. Said appellant's suit was based on a claim that a perseverance bonus accrued later under the contract, and was for the amount due him, and such sums as were due other Cuban Nationals holding contracts with similar bonus provisions. The class was said to include more than 5,000 such contract holders. The second appellant was the holder of an insurance contract with appellee in the amount of \$5,000.00. He sought his contract rights and those of all other Cuban National policyholders similarly situated. Both actions were dismissed by the District Court for the Southern District of Florida for lack of jurisdictional amount. The Court of Appeals for the Fifth Circuit affirmed holding that new Rule 23, adopted July 1, 1966, "is of no avail as it does not abrogate the well settled principle that separate and distinct claims may not be aggregated to make the jurisdictional amount even in a class action." *Id.* at 993.

The question presented to this Court, in **Alvarez**, upon which certiorari was denied was as follows:

“Does amended F. R. Civ. P. 23 abolish distinctions that existed as to class actions, so that representatives of class may now aggregate entire class’ claims for jurisdictional purposes, provided that adequate and fair representation of all parties be shown.” 36 U. S. L. Week 3046 (Jul. 18, 1967).

The logic of petitioner’s position is untenable in light of the history of the established doctrine of aggregation in arriving at the jurisdictional amount. That doctrine is not procedural, but rather substantive law applicable with respect to jurisdiction in the federal courts. It has ancient roots, antedating the Federal Rules of Civil Procedure. As early as 1832, the aggregation doctrine was applied by this Court as a substantive law of jurisdiction in **Oliver v. Alexander**, 31 U. S. (6 Pet.) 143 (1832).⁴ As subsequently developed, the aggregation doctrine is delineated by the following statement in **Troy Bank of Troy, Ind. v. G. A. Whitehead & Co.**, 222 U. S. 39, 41 (1911):

“When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interest collectively equal the jurisdictional amount.”

⁴ Before 1911, this aggregation doctrine was reiterated in many cases. See, e. g., **Stratton v. Jarvis**, 33 U. S. (8 Pet.) 4 (1834); **Rich v. Lambert**, 53 U. S. (12 How.) 347 (1851); **Shields v. Thomas**, 58 U. S. (17 How.) 3 (1854); **Seaver v. Bigelows**, 72 U. S. (5 Wall.) 208 (1867); **Ballard Paving Co. v. Mulford**, 100 U. S. (10 Otto) 147 (1879); **Russell v. Stansell**, 105 U. S. (15 Otto) 303 (1882); **Ogden City v. Armstrong**, 168 U. S. 224 (1897); **Wheless v. St. Louis**, 180 U. S. 379 (1901).

Since then, that doctrine has been preserved in numerous decisions by this Court. See, e. g., **Pinel v. Pinel**, 240 U. S. 594 (1916); **Scott v. Frazier**, 253 U. S. 243 (1920); **Lion Bonding & Surety Co. v. Karatz**, 262 U. S. 77 (1923); **Clark v. Paul Gray, Inc.**, 306 U. S. 583 (1939); **Thompson v. Gaskill**, 315 U. S. 442 (1942).

It was not until June 19, 1934, however, that the Supreme Court was given the power to enact the Federal Rules of Civil Procedure, c. 651, §§ 1, 2, 48 Stat. 1064 (1934), 28 U. S. C., § 723c (1940).

In view of this history, it is obvious that the amending of Fed. R. Civ. P. 23 could in no wise, ipso facto, change the long standing jurisdictional doctrine of aggregation. For that doctrine attaches no special significance to class actions under Rule 23, but applies in all instances where two or more parties unite in a single suit for convenience or economy. If the demands are separate and distinct, each demand must have the jurisdictional amount; if there is a single right, in which the interests are joint and undivided, aggregation is permitted. It is for this reason that under the old Rule 23, aggregation of claims to meet jurisdictional amount was permitted in "true" class actions, in which the right to be enforced was joint or common, but not in "hybrid" or "spurious" class actions in which there was no joint interest or right. 2 Barron & Holtzoff, **Federal Practice and Procedure**, § 569, pp. 321-2 (1961). See also, **Fuller v. Volk**, 351 F. 2d 323 (3d Cir. 1965); **Alfonso v. Hillsborough County Aviation Authority**, 308 F. 2d 724 (5th Cir. 1962); **Troup v. McCart**, 238 F. 2d 289 (5th Cir. 1956); **Matlaw Corp. v. War Damage Corp.**, 164 F. 2d 281 (7th Cir. 1947).

With like effect, the doctrine has been applied to cases where there is permissive joinder of two or more plaintiffs under Fed. R. Civ. P. 20; **Eagle Star Ins. Co. v. Maltes**, 313 F. 2d 778 (5th Cir. 1963); and to joint actions

prior to Rule 20, **Troy Bank of Troy, Ind. v. G. A. Whitehead**, 222 U. S. 39 (1911). Similarly, in cases involving two or more defendants the doctrine has been applied. **Sovereign Camp, Woodmen of the World v. O'Neill**, 266 U. S. 292, 295 (1924); **Fecheimer Bros. Co. v. Barnwasser**, 146 F. 2d 974 (6th Cir. 1945). It has even been applied to Fed. R. Civ. P. 17 (a), dealing with real parties in interest and to Fed. R. Civ. P. 24 dealing with intervention. **Phoenix Ins. Co. v. Woosley**, 287 F. 2d 531 (10th Cir. 1961); **United Steelworkers of America v. New Park Min. Co.**, 169 F. Supp. 107, 113-14 (D. Utah 1958), reversed on other grounds, 273 F. 2d 352 (10th Cir. 1959). Accordingly, there is nothing which suggests that this doctrine does not apply to amended Rule 23, so as to disallow aggregation in a class action where the claims are separate and distinct. **Alvarez v. Pan American Life Ins. Co.**, 375 F. 2d 992 (5th Cir. 1967); **DeLorenzo v. Fed. Deposit Ins. Corp.**, 259 F. Supp. 193, 195, n. 5 (S. D. N. Y. 1966).

Of course, the petitioner recognizes that her claim is separate and distinct from other shareholders (Pet. 8), but urges that the elimination of the distinctions between "true", "hybrid" and "spurious" has somehow changed the doctrine of aggregation with respect to her. In support thereof, she asserts that the purpose of the amendment was to provide a forum for small claimants⁵ and that all the members of the class are now bound by the judgment. We believe such position is untenable. In the first place, the application of the aggregation doctrine to amended Rule 23 is entirely consonant with the purpose stated by petitioner. For if the rights to be enforced are

⁵The Notes of the Advisory Committee on the Rules, setting forth purposes for the amended Rule 23, nowhere suggest that one of the purposes was to provide a forum for small claimants. See 28 U. S. C. A., Fed. R. Civ. P. 23 (cumulative pocket part 1967) pp. 67-68.

joint and undivided, then the small claimants can use the federal forum, provided their claims collectively satisfy the jurisdictional amount. Secondly, even if the members of the class are joined as plaintiffs under Fed. R. Civ. P. 20, or as in the case of hybrid actions under old Fed. R. Civ. P. 23 where all the members of the class were bound by the judgment, the aggregation doctrine still applies. Thus, it matters not whether Rule 23, as amended, makes the members of the class bound by the judgment; what matters is whether the character of the claims is separate and distinct.

Petitioner places great reliance on **The Gas Service Company v. Coburn**, 389 F. 2d 831 (10th Cir. 1968).⁶ We submit that that case was wrongly decided. The only precedent involving federal jurisdiction in diversity class actions given as authority for the holding in **The Gas Service Co.** case is **Gibbs v. Buck**, 307 U. S. 66 (1939). In **Gibbs v. Buck**, however, this Court applied the aggregation doctrine, permitting aggregation of claims because there was a common and undivided interest in the matter in controversy. See, **Gibbs v. Buck**, 307 U. S. 66 at 74 (1939); **Buck v. Gallagher**, 307 U. S. 95, 103 (1939); Nothing within the holding of the **Gibbs** case purported to authorize the aggregation of claims in the absence of such common and undivided interest. This is borne out by the case of **Clark v. Paul Gray, Inc.**, 306 U. S. 583 at 588-89 (1939), decided the same day by this Court and citing the **Gibbs** case. In **Clark v. Paul Gray, Inc.**, aggregation was not permitted to satisfy jurisdictional requirements because no joint and undivided interest of the numerous plaintiffs was shown in the subject matter of the suit. See also, **Hilliker v. Grand Lodge K. P.**, 112 F. 2d 382, 384

⁶ A petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit was filed in **The Gas Service Co. v. Coburn** in this Court as No. 1455.

(6th Cir. 1940). Thus, the Tenth Circuit in **The Gas Service Company v Coburn**, has misconstrued the decision of this Court in **Gibbs v. Buck**, which decision is contrary to the holding of **The Gas Service Co.** case and in fact supports the respondents herein. Further, respondents fail to see how **Provident Tradesmens Bank & Trust Co. v. Patterson**, 390 U. S. 102 (1968) can in any way give comfort to **The Gas Service Co.** holding, as the Tenth Circuit seems to believe, since the **Provident Tradesmens Bank & Trust Co.** case dealt neither with the jurisdiction of Federal courts nor amended Rule 23. Rather the **Provident Tradesmens Bank & Trust Co.** case dealt with amended Fed. R. Civ. P. 19 as to findings of "indispensability," which is not analogous to the cause at bar or to **The Gas Service Co.** case.

At any rate, **The Gas Service Company v. Coburn** applies amended Rule 23 so as to confer jurisdiction on federal courts where prior to the amendment in similar situations there was none. As such, that case transgresses Rule 82, as amended, which provides in part:

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

See **Sturgeon v. Great Lakes Steel Corp.**, 143 F. 2d 819 (6th Cir. 1944). So also, **The Gas Service Co.** case is contrary to previous decisions of this Court holding that the Supreme Court is without power under its rule making authority to enlarge or diminish the substantive rights of litigants or the jurisdiction of Federal Courts. **United States v. Sherwood**, 312 U. S. 584, 589-90 (1941); **Sibbach v. Wilson & Co.**, 312 U. S. 1, 10 (1941).

Respondents submit that this Court has carefully considered the propositions advanced by petitioner recently in **Alvarez v. Pan American Life Ins. Co.**, 375 F. 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 827 (1967); that

the decision of the United States Court of Appeals for the Tenth Circuit in **The Gas Service Co. v. Coburn**, 389 F. 2d 831 (10th Cir. 1968) and the proposition of petitioner advanced herein are anomalous to the settled doctrine of aggregation and violative of Fed. R. Civ. P. 82 as amended July 1, 1966, as well as cases decided by this Court; and that the decision below is in accord with the intention of Congress to limit rather than expand federal diversity jurisdiction.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

Respectfully submitted,

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Counsel for Respondent.

SEP 9 1968

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. **117**

THE GAS SERVICE COMPANY,
Petitioner,

vs.

**OTTO R. COBURN, on Behalf of Himself and
All Others Similarly Situated,**
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITIONER'S PETITION FOR A WRIT
OF CERTIORARI**

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1967

No. _____

THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and
All Others Similarly Situated,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITIONER'S PETITION FOR A WRIT
OF CERTIORARI**

Comes now Otto R. Coburn, on behalf of himself and all others similarly situated, and requests that petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming an order of the United States District Court for the District of Kansas be denied.

I.

STATEMENT

For the purposes of this proceeding, respondent accepts as accurate petitioner's statements in its petition under the captions: OPINIONS BELOW, JURISDICTION, QUESTION PRESENTED, STATUTE AND RULES INVOLVED, and STATEMENT, with the exception of a part of the last paragraph under the caption STATEMENT, where it is said:

"The court below answered the question in the affirmative, after conceding that aggregation of the claims here involved was not permissible under former Rule 23. It specifically declined to follow the holding in *Alvarez v. Pan American Life Insurance Co., et al.*, 5 Cir., 375 F.2d 992, certiorari denied, 389 U.S. 827, that the amendment to Rule 23 had no effect upon jurisdiction." (Petition for Cert., p. 5).

The Court below actually held that Rule 23 of the Federal Rules of Civil Procedure did not affect the principle of aggregation either before or after its amendment (Appendix, p. A5).

II.

ARGUMENT

We will respond to petitioner's "REASONS FOR GRANTING THE WRIT" in the order followed by petitioner.

1. We must admit that the decisions by the District Court and the Court of Appeals for the Tenth Circuit conflict with the decision by the Court of Appeals for the Fifth Circuit in *Alvarez v. Pan American Life Insurance Co., et al.*, 5 Cir., 375 F.2d 992, certiorari denied, 389 U.S. 827. The Court of Appeals, in the latter case, concluded

that the principle of aggregation was within the scope of jurisdiction which, in turn, was restricted to the powers of Congress and outside the rule-making power of the Supreme Court. From this the Court concluded that plaintiffs, with claims separate and distinct, could not aggregate in order to satisfy the jurisdictional amount. It would seem, however, that the Fifth Circuit was not satisfied with the result of its decision because the Court concluded its comments as to aggregation of claims for jurisdictional purposes by stating:

"... an accommodation of jurisdiction to the class action procedure, if deemed necessary, is a question which addresses itself to the Congress or the Supreme Court." *Alvarez v. Pan American Insurance Co., et al.*, supra, p. 996.

The jurisdictional limitation of \$10,000.00 is statutory in origin.¹ The principle of aggregation has been established, not by statute, but by case decisions. *Gibbs v. Buck*, 307 U.S. 66, *Pinel v. Pinel*, 240 U.S. 594. We agree that the principle of aggregation for jurisdictional purposes is one of long standing. However, we do not agree that this principle is outside the rule-making power of the courts as concluded by the Court of Appeals in the *Alvarez* case. Such is the position taken by the Court below:

"Because the claims of the individuals constituting the class in the case at bar are neither 'joint' nor 'common' this action under Rule 23 before amendment³ would not have been classified as a 'true' class action and aggregation of claims would not have been permitted. See *Aetna Ins. Co. v. Chicago Rock Island & Pac. R. R.*, 10 Cir., 229 F.2d 584. The Fifth Circuit in *Alvarez v. Pan American Life Ins. Co.*, 375 F.2d 992, has held that this result is still dictated after adoption

1. 28 U.S.C. 1332.

of the new rule. Citing *Clark v. Paul Gray, Inc.*, 306 U.S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,⁴ the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in 'a *sub silentio* manner.' 375 F.2d at 995. We must respectfully disagree. It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In *Gibbs v. Buck*, 307 U.S. 66, 72, the Supreme Court stated it thus:

'... federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value.'

Rule 23 before or after amendment does not purport to affect this principle." (Appendix, pp. A4-A5)

3. The rule then provided in pertinent part: '(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.'

4. 'These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. ...'

Petitioner points out that the Court of Appeals for the Eighth Circuit in *Snyder v. Harris*, 390 F.2d 204, followed the *Alvarez* case and is, therefore, in conflict with the decisions by the Court below in this matter. We cannot disagree with that statement, but we do point out that the Court of Appeals, in the *Snyder* case, was probably unaware of the decision in this case and was not afforded the opportunity to reflect upon the opinion of our Court of Appeals because the decision was handed down only four days before the decision in *Snyder*.

Clearly, there is a conflict between decisions of the Courts of Appeals for the Tenth Circuit and the Fifth and Eighth Circuits. However, the conflict involves a narrow point of federal procedure. Only three of the Circuits have ruled on the question, and the majority of the Circuits have yet to speak. None of the other Circuits, including the Fifth and the Eighth, have had the opportunity to address themselves to the position taken by the Court below. It would undoubtedly be helpful and the Supreme Court would be afforded a more comprehensive study in determining this question after the conflicting opinions are tested by careful analysis in the remaining jurisdictions. It may be of interest to the Supreme Court that the Honorable Peter Woodbury of the First Circuit sat, by designation, on the Court below and concurred in the opinion.

This case does not involve a question of constitutional rights, nor does it involve a federal question of substantive law. This suit is between private citizens whose substantive rights will be determined by the laws of the state of Kansas. Any conflict between the Circuit Courts of Appeals is not so serious at this time to warrant review by the Supreme Court.

2. We have already commented in part on petitioner's allegation that the decision by the Court below, in this

matter, is an unwarranted extension of federal jurisdiction in violation of Rule 82 of the Federal Rules of Civil Procedure. Petitioner assumes since more litigants might avail themselves of the federal forum, it necessarily follows that federal jurisdiction has been extended. Rule 23, as amended, eliminates the three cumbersome categories of class actions, *true*, *spurious*, and *hybrid*, that existed previously. Now, as was true before the amendment, class actions are statutory in nature, and aggregation was permitted only in true class actions. *Matlaw Corporation v. War Damage Corporation*, 7 Cir., 164 F.2d 281 (1947); *Fuller v. Volk*, 3 Cir., 351 F.2d 323 (1965). Aggregation was not permitted in *hybrid* and *spurious* actions. *Pinel v. Pinel*, *supra*. *Hybrid* and *spurious* class actions were, when analyzed, not actually class actions but were permissive joinder actions whereby plaintiffs were allowed to join together even though their claims were separate and distinct. The effect of the amendment to Rule 23 is to eliminate the categories of *spurious* and *hybrid*. Rule 23, as amended, corrects the anomaly that previously existed when class actions were categorized as *true*, *spurious* or *hybrid*. In theory, although not in practice, there was only one real class action, the *true* class action, prior to the amendment and that is still true under Rule 23, as amended.

The principle of aggregation, and the substantive law pertinent to it, arose from case decisions, not by statute. To say that the courts cannot now deviate from those decisions because it would be an extension of federal jurisdiction contrary to Rule 82, we submit, is an unwarranted restriction on the powers of the courts.

Petitioner also ignores that part of Rule 82 which provides that the Federal Rules of Civil Procedure shall not be construed to limit the jurisdiction of the United States District Courts. The Supreme Court found it neces-

sary and appropriate to revise Rule 23. We suggest that in the event the plaintiffs, in a class action, meet the prerequisites set out in Rule 23, that it would be an improper limitation of federal jurisdiction to then deny them the right to bring the action in Federal Court because the amount in controversy of each individual plaintiff is less than the jurisdictional amount.

The Court below considered whether its decision would be in violation of Rule 82, and in determining that it would not, said:

"We find comfort for our view in *Provident Bank v. Patterson*, U.S., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: '(1) there is a category of persons called "indispensable parties;" (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute.' Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction." (Appendix, p. A6).

III.

CONCLUSION

Any conflict between the Circuit Courts of Appeals resulting from the decision of the Court below, in this matter, is not so serious as to warrant a review of the matter by the Supreme Court. The question involved is procedural. That question has been decided by the Court below, and the procedure in the Tenth Circuit is, therefore, established. The decision by the Court below does not ex-

tend the jurisdiction of the United States District Courts in violation of Rule 82 of the Federal Rules of Civil Procedure, nor do the implications of the decision below reach beyond the provisions of amended Rule 23 as alleged by petitioner. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

January Term, 1968

THE GAS SERVICE COMPANY,
Appellant,

vs.

OTTO R. COBURN, on behalf of
himself and all others similarly
situated,

Appellee.

No. 9635

Appeal from the United States District Court for the
District of Kansas

Gerrit H. Wormhoudt (Robert L. Coleman, Kirke W.
Dale and Paul R. Kitch were with him on the brief) for
Appellant.

William V. Crank (D. Arthur Walker, Richard E. Cook,
George B. Collins, Robert Martin, K. W. Pringle, Jr., W. F.
Schell, Robert M. Collins, W. L. Oliver, Jr., Tom C. Trip-
lett, Thomas M. Burns and Peter J. Wall were with him
on the brief) for Appellee.

Before WOODBURY*, LEWIS and HICKEY, Circuit Judges.

LEWIS, Circuit Judge.

This is an interlocutory appeal authorized in compliance with 28 U.S.C. § 1292(b) to allow appellate consideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. § 1332 where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption outside the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding \$10,000, and that such individual

*Of the First Circuit, sitting by designation.

claims are variable in amount¹ but would aggregate to more than \$10,000.

The trial court found, and it seems indisputable, that plaintiff's action definitely meets each prerequisite to a class action as presently set out in Rule 23(a) and one or more of the additional requirements of 23(b).² The class

1. By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was \$7.81.

2. The amended Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

is numerous; a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment³ would not have been classified as a "true" class action and aggregation of claims would not have been permitted. See *Aetna Ins. Co. v. Chicago Rock Island & Pac. R.R.*, 10 Cir., 229 F.2d 584. The Fifth Circuit in *Alvarez v. Pan American Life Ins. Co.*, 375 F.2d 992, has held that this result is still dictated after adoption of the new rule. Citing *Clark v. Paul Gray, Inc.*, 306 U.S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,⁴ the Fifth Circuit rea-

3. The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

4. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

soned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F.2d at 995. We must respectfully disagree.

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In *Gibbs v. Buck*, 307 U.S. 66, 72, the Supreme Court stated it thus:

"... federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.⁵ The Advisory Committee's Note, 39 F.R.D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true," "hy-

5. *Clark v. Paul Gray, Inc.*, 306 U.S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

brid," and "spurious." "In practice," said the Committee, "the terms 'joint,' 'common,' etc. which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true," "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in *Provident Bank v. Patterson*, U.S., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensible parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, *Gibbs v. Buck*, *supra*, and it follows, under the new rule, that when a cause clearly falls within its

terms as a class action, as here, the claims of the entire class are in controversy.⁶

The judgment is affirmed and the cause remanded for further proceedings.

JANUARY TERM, FRIDAY, FEBRUARY 23rd, 1968.

Before Honorable Peter Woodbury, Honorable David T. Lewis and Honorable John J. Hickey, Circuit Judges.

The Gas Service Company,	Appellant,	} Appeal from the United States Dis- trict Court for the District of Kansas.
9635	vs.	
Otto R. Coburn, on behalf of himself and all others similarly situated,		
	Appellee.	

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings.

6. Professor Wright considers this to be a realistic view. He states:

"The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."

DEC 3 1968

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 109.

**MARGARET E. SNYDER, Also Known as PEG SNYDER,
Petitioner,**

vs.

**CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.**

**On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit.**

BRIEF FOR THE PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

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BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 29-30) is reported at 390 F. 2d 205. The opinion of the United States District Court of Missouri is not reported and is set forth at R. 21.

JURISDICTION.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 27, 1968 (R. 31). Petitioner's Petition for Rehearing, or, in the

alternative, to transfer to the court en banc, was duly and timely filed in said United States Court of Appeals for the Eighth Circuit (R. 32). Said Petition for Rehearing, or, in the alternative, to transfer to the court en banc, was denied on March 22, 1968 (R. 43). Petitioner's petition for a writ of certiorari was filed May 17, 1968 and was granted October 21, 1968.

The jurisdiction of this court is invoked under 28 U. S. C., 1254 (1).

QUESTION PRESENTED.

Whether under Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where a class action under the amended rule is otherwise appropriate.

STATUTE AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED.

28 U. S. C., § 1332 (a) (1): The said 28 U. S. C., § 1332 (a) (1) provides:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000.00, exclusive of interest and costs, and is between—

(1) citizens of different States;”

Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966. The provisions in said rule are lengthy and the text is set forth in Appendix A hereto, *infra*, p. 19.

STATEMENT.

Petitioner filed this class action pursuant to Amended Rule 23, Federal Rules Civil Procedure, effective July 1, 1966 in the United States District Court for the Eastern District of Missouri, Eastern Division, to recover judgment in the amount of \$1,200,000.00 for the class (R. 6). In her Amended Complaint (R. 6-10) Petitioner alleged that;

Petitioner is a citizen of Arizona and the Respondents are citizens of Missouri; there is diversity of citizenship, and the amount in controversy exceeds \$10,000.00 exclusive of costs and interest; since prior to November 22, 1966, Petitioner has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (Missouri Fidelity) and owns 2,000 of said company's shares; the bylaws of Missouri Fidelity provide for a board of fifteen directors and Respondents at all times relevant were members of said board; on or about November 22, 1966 eight of the Missouri Fidelity directors including the Respondents entered into an agreement with National Western Life Insurance Company (National Western) whereby and in pursuance of which National Western purchased from such eight directors and relatives and friends of theirs 300,000 Missouri Fidelity shares and paid them therefor a premium of about \$1,200,000.00 in excess of the then market price and as condition for such purchase said eight directors resigned, and such proceedings were had that five nominees of National Western were elected directors of Missouri Fidelity and as a majority of its executive committee and of its investment committee; such premium of \$1,200,000.00 was paid by National Western for the resignations of the directors who so resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity; the mentioned conduct and acts of said eight directors including Re-

spondents were a breach of trust and in violation of their duties as Missouri Fidelity directors;

The class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states and it would not be practical for all of them to join or be joined in this action and Petitioner brings this action on behalf of herself and all other shareholders of Missouri Fidelity; that by reason of the aforesaid matters the said premium of approximately \$1,200,000.00 should be distributed to Petitioner and the other shareholders of Missouri Fidelity similarly situated.

The prayer in the amended complaint prayed that the Court enter its Order determining that a class action shall be maintained and that the Court enter judgment in the amount of \$1,200,000.00 in favor of Plaintiff and other Missouri Fidelity shareholders in accordance with the Missouri Fidelity shares held by them respectively and for attorneys' fees and costs and that the Court's judgment include and describe those whom the Court finds to be members of the class.

The Respondents filed a motion to dismiss the Amended Complaint (R. 10-12). Such motion alleged various grounds for dismissal of the Amended Complaint, including lack of jurisdictional amount. In its Opinion the District Court stated that for reasons set forth in its Opinion the Court need only consider the question of lack of jurisdictional amount (R. 21).

The Respondents contended that if the Petitioner has pleaded a class action, she has pleaded a "spurious" class action and that the jurisdictional amount in such action may not be determined by aggregating the amounts which might be claimed by others in the class action, and that the Petitioner's individual claim can amount to no more than \$8,740.00. The Petitioner, on the other hand, contended that since "spurious" class actions no longer

exist under Rule 23, F. R. C. P., as amended July, 1966, and since a judgment in any class action under said Amended Rule 23 is now binding upon the entire class, the claims of the entire class are in controversy and should, therefore, be aggregated in arriving at the jurisdictional amount (R. 23).

The District Court sustained Respondent's motion to dismiss Petitioner's Amended Complaint and dismissed the action without prejudice on the ground that Petitioner's claims are separate and distinct from those of other persons in the class, that Rule 23 as amended has not changed the rule existing prior to the amendment, that in such a case the claims could not be aggregated in arriving at the jurisdictional amount, that therefore Petitioner may not aggregate her claim with those of others in the class, that Petitioner alleged her damages at \$8,740.00, and that accordingly, the amount in controversy does not exceed \$10,000.00 and the Court therefore lacked jurisdiction over the controversy (R. 21).

On Petitioner's appeal, the District Court's said Order and Judgment was affirmed on February 27, 1968, by the United States Court of Appeals for the Eighth Circuit on the basis of the District Court's opinion and of the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 826 (1957) (R. 29). Rehearing was denied on March 22, 1968 (R. 43).

On February 23, 1968, in the case of **The Gas Service Company v. Coburn, etc.**, 389 F. 2d 831 (10th Cir. 1968), the United States Court of Appeals for the Tenth Circuit rendered a decision in direct conflict with the above mentioned opinions of the District Court and of the Court of Appeals for the Eighth Circuit, and of the ruling of the Fifth Circuit in **Alvarez**, above mentioned, on which the Eighth Circuit relied in the instant case.

On March 14, 1968, Petitioner timely filed in the Eighth Circuit Court of Appeals her Petition for Rehearing or in the Alternative, to Transfer to the Court En Banc and therein called attention to the above mentioned ruling and decision of the Tenth Circuit Court of Appeals and filed with her said Petition as an appendix thereto a copy of the Opinion of the Tenth Circuit in **The Gas Service Company, supra** (R. 43).

In **The Gas Service Company v. Coburn, supra**, the United States Court of Appeals for the Tenth Circuit expressly held that even though the claims of the individuals constituting the class in the case there presented were neither "joint" nor "common" yet under Rule 23, Fed. R. Civ. P., as amended in July 1966, the claims of the entire class were in controversy and could be aggregated for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., Section 1332. With respect to the decision of the United States Court of Appeals for the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992, relied on by the Eighth Circuit in the instant case, the Tenth Circuit stated: "We must respectfully disagree."

Petitioner's said Petition for Rehearing, or in the Alternative to Transfer to the Court en Banc, was denied by the Eighth Circuit Court of Appeals on March 22, 1968 (R. 43). Petitioner's Petition for a Writ of Certiorari was filed May 17, 1968 and was granted October 21, 1968.

ARGUMENT.

The July, 1966 Amendment of Rule 23 of the Federal Rules of Civil Procedure Extinguished the Distinction Between "True" and "Spurious" Class Actions and Made Permissible the Aggregation of Several and Distinct Claims for the Purpose of Satisfying the Diversity Jurisdictional Amount Requirement of 28 U. S. C., Section 1332, Where a Class Action Is Otherwise Validly Instituted.

Petitioner submits that the "amount in controversy" jurisdictional requirement of \$10,000.00 exclusive of interest and costs is satisfied in the present case since the aggregate amount of the claims of the class is in excess of \$1,000,000.00 (R. 6).

Under former Rule 23, class actions were of three types: (1) hybrid, (2) true, and (3) spurious. The distinction was based upon the so-called "jural" relationship of the class members. One of the consequences of deciding which type of class action was involved in a given case was a determination as to whether class members could aggregate their respective claims to satisfy the amount in controversy requirement. If one filed a "true" class action, it followed that the members' relationship was "joint" and therefore the claim was not "several" and aggregation was permitted. However, a "spurious" class action meant, *inter alia*, that the members' relationship, though "common," was "several" and therefore aggregation was not permitted. *Pinel v. Pinel*, 240 U. S. 594 (1916).

In Barron and Holtzoff, Federal Practice and Procedure, Sec. 569, pp. 322-23, the following definition is given to a "spurious" class action under Subdivision (a) (3) of the former Rule 23:

"A 'spurious' class action under subdivision (a) (3) of this rule (former rule 23) in which the rights

sought to be enforced are several, and there is a common question of law or fact and common relief is sought, is in effect a congeries of separate actions" (Emphasis supplied).

In **All American Airways v. Elder**, 209 F. 2d 247 (2nd Cir.), the Court stated at page 248:

"In justice to the litigants it must be admitted that there still seems considerable confusion as to the meaning and effect of the third group of class actions authorized by F. R. 23 (a), 28 U. S. C. A., a confusion not lessened by the load it bears in its popular legal cognomen of 'spurious class action.' There is perhaps something anomalous in apparent legal participation in a lawsuit by persons unnamed and unidentified as individuals who, unless they show themselves by intervening, remain legally unaffected by any action taken in the case. The legal rationale lags behind the practical utilities found in the device and its 'psychological value' (3 Moore's Federal Practice 3445, 2d Ed. 1948) on courts and potential litigants. It stands as an invitation to others affected to join in the battle and an admonition to the court to proceed with proper circumspection in creating a precedent which may actually affect non-parties, even if not legally *res judicata* as to them. Beyond this, as we in common with other courts have pointed out, it cannot make the case of the claimed representatives stronger, or give them rights they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene."

From the above it is clear that under the former Rule 23 the courts and legal authorities considered a "spurious" action as (1) consisting of "separate actions" in which the plaintiffs merely joined for convenience sake and (2) that no judgment could be binding on a member

of the named class unless the member of the class actually intervened and (3) there could in one case be separate and inconsistent judgments—i. e., a judgment in favor of one member of the class and a judgment against another member of the class.

Under Amended Rule 23 there can only be one action as the said Rule specifically provides for one judgment. In said Amended Rule 23 it is provided:

“
“(B) the judgment, whether favorable or not, will include all members who do not request exclusion;”
(Emphasis supplied)

“
“The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class” (Emphasis supplied).

It is easily ascertained from the above that in the type of class actions contemplated by Amended Rule 23 there can only be one consistent judgment as to all members of the class who have not chosen to be excluded.

One might ask how can there always be one consistent judgment as to all members of the class—what is to happen in a fraud case where as to each member of the class there may be such independent questions as “right to rely” (in *Miller v. National City Bank of New York*, 166 F. 2d 723 (2nd Cir.), the court refused aggregation

because of the independent question "right to rely"). The Amended Rule 23 protects the defendant as to his right to raise individual defenses in that it is provided in the Rule that before a class action may be maintained there must be "questions of law or fact common to the class" and that "the claims or defenses of the representative parties are typical of the claims or defenses of the class". Therefore, in a fraud type action the court could very well hold that the action was not a proper one to be brought as a class action under Rule 23 as there is no "common question of law or fact common to the class" and "the claims or defenses of the representative parties" are not typical of the claims or defenses of the class.

In the instant case there can be no question but that the questions of law and of fact are identical as to each member of the class and any defense the respondents might have would have to be identical as to each member of the class.

The Eighth Circuit Court of Appeals, in the case at bar, relied on the Fifth Circuit case of **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir.). Petitioner believes that the **Alvarez** case is erroneous. In **Alvarez** the Court held that the Amended Rule 23 could not increase Federal jurisdiction or Federal jurisdictional amount and that in the type of action formerly known as a "spurious class action" the Court, in spite of amended Rule 23, in determining the "amount in controversy" requirement, must look only at the amount affecting each individual plaintiff and not the amount affecting the class. In **Alvarez**, the Court, in sole support of its position, stated that Rule 82, F. R. Civ. P., provides:

"These rules shall not be construed to extend or limit the jurisdiction of the United States District Court * * *".

Rule 82 is completely inapplicable as the new Rule 23 does not in any way affect jurisdictional amount or create jurisdiction in different types of actions. It simply provides a **procedure** where there can be **one** judgment binding an entire class under circumstances such as the case at bar—it simply provides for one single action, in cases such as the one at bar, where prior to its enactment the courts treated such a case as consisting of separate actions subject to separate judgments and not binding on the class unless the member of the class actually intervened.

How is it possible to say in the instant case that the "amount in controversy" does not exceed \$10,000 where there could be **one** judgment in excess of \$1,000,000 binding the whole class and in which members of the class would be bound (unless they exclude themselves as above mentioned) regardless whether or not they joined in the law suit?

• If the court in **Alvarez** in relying on Rule 82, is correct then amended Rule 23 would have to be declared invalid as the Rule extends the binding effect of "the judgment" to include members of the class whether or not they have intervened in the action where prior to said Rule they were not bound by the court's judgment. Applying the reasoning of **Alvarez** the binding effect of a judgment in a class action on members of the class who have not actually joined in the action would be an extension of "jurisdiction" prohibited by Rule 82.

The Fifth Circuit case of **Texas Employers Ins. Assn. v. Felt**, 150 Fed. 2d 227 (5th Cir.) is very much in point and very much contrary to the reasoning in the **Alvarez** case. In **Texas Employers** the Court had under consideration Rule 20 which provides that all persons may be joined in one action as Defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief

in respect of or arising out of the same transaction or occurrence and if any question of law or fact common to all of them will arise in the action. The Court considered the effect of Rule 82 on Rule 20, which said Rule 82, as above set forth, provides:

"These rules shall not be construed to extend or limit the jurisdiction of the United States District Court * * *".

The Court held that Rule 20 "does not effect jurisdiction but it regulates procedure" (Id. at 231). (Emphasis supplied.)

The new Rule 23 also regulates "procedural" and does not affect "jurisdiction". It merely provides procedure in class actions for one binding judgment against all members of the class except those who have given notification of their desire to be excluded.

The Court in **Texas Employers**, *supra*, stated at pages 231-232:

"There is no procedural reason why a single suit may not be maintained in the Federal Court if the Plaintiff's right to relief arises out of the same transaction and presents a question of law or fact common to all of the Defendants."

Similarly, there is no "procedural reason" why amended Rule 23 cannot provide for one binding judgment on all members of the class.

The Gas Service Company v. Coburn, 389 F. 2d 831 (10th Cir.), is in direct conflict with said **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir.), and directly supports Petitioner's contentions herein. In **The Gas Service Company** case, the Court stated at page 834:

"It is true, of course, that the rule-making power does not include the right to create or abrogate sub-

stantive law and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction. But, it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In *Gibbs v. Buck*, 307 U. S. 66, 72, the Supreme Court stated it thus:

‘... federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value.’

Rule 23 before or after amendment does not purport to affect this principle.”

● “The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.⁵ The Advisory Committee’s Note, 39 F. R. D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as ‘true’, ‘hybrid’, and ‘spurious’. ‘In practice’, said the Committee, ‘the terms “joint”, “common”, etc., which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain.’ These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of ‘true’, ‘hybrid’ and ‘spurious’ must be perpetuated to allow or defeat ag-

gregation would seem to render the rule sterile in that regard" (Emphasis supplied).

With respect to the Fifth Circuit Court of Appeals decision in *Alvarez*, supra, the Tenth Circuit Court of Appeals stated at page 834:

"We must respectfully disagree."

The case of *Snyder v. Epstein, et al.*, now pending in the United States District Court for the Eastern District of Wisconsin, Cause No. 66-C-329, also directly supports Petitioner's contentions herein (This case is not yet reported and is set forth in Appendix B hereto. Petitioner is the Plaintiff in said Wisconsin *Snyder* case, supra, and the action is identical to the one at bar, with the exception of the defendants, who are two of the directors of Missouri Fidelity that are not subject to service of process in the instant case.) In *Snyder v. Epstein*, supra, the Wisconsin District Court in permitting aggregation stated that (page 33 of Appendix B hereto):

"The purposes of class actions would be largely defeated, especially in the situation like this one before the court where a stockholder is seeking to recover for the breach of trust by officers and directors of the corporation, if it is held that only persons with a claim in excess of \$10,000.00 may institute a class action. With such reasoning, it is not inconceivable that corporate directors could be totally immune from suit in a federal court, although there could be literally hundreds of stockholders with a legitimate cause of action against the directors. Consequently, this court will permit aggregation of amounts where a class action is otherwise validly instituted."

The District Court for the Northern District of Illinois in *Booth v. General Dynamics Corporation*, 264 F. Supp. 465 (N. D. Ill.) held that aggregation of claims under amended Rule 23 is proper. The Court stated at page 470:

“The recent amendments to the Federal Rules of Civil Procedure have extinguished the tortured distinction between ‘true’ and ‘spurious’ class actions. New standards for determining whether a class action is maintainable were established under the new Rule 23. It is by these new standards, rather than under the outworn authorities cited by the present litigants, that we must determine whether this suit may be maintained as a class action, * * *.”

* * * Without the class action device, the aggregation of claims necessary to meet the jurisdictional amount requirement would be so difficult that the perpetrators of illegal transactions such as are alleged here would enjoy something akin to immunity in the federal courts” (Id. at 472).

Judge Alexander Holtzoff, recognizing the intentions and purposes of Amended Rule 23 to broaden and make more flexible said Rule has, in commenting on the new Amended Rules, stated that:

“The Rules as to class actions is broadened and made more flexible. This distinction between true, hybrid and spurious class actions is abrogated. The ultimate result is that as liberal as the Rules were, the progressive Amendments now adopted make them still more liberal and still more flexible.” **Holtzoff, a Judge Looks at the Rules, Rules of Civil Procedure and Judicial Code, p. 19 (1966 Ed.).**

Charles Alan Wright, Professor of Law at the University of Texas and a member of the Committee on Rules of Practice and Procedure which drafted the revised rules, and who has long been a leading authority on the Federal Rules, in commenting on the broadened and more flexible purposes of Amended Rule 23, stated:

"* * * it was held under the former rule that aggregation of the claims of all members of the class was permitted in the 'true' class action, where the rule required a 'joint' or a 'common' interest, but not in 'hybrid' or 'spurious' class actions. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversies.' A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached." **Barron & Holtzoff, Federal Practice and Procedure**, Sec. 569 (Supp., p. 58, 1966). (Emphasis supplied.)¹

CONCLUSION.

Amended Rule 23 abrogates for all purposes the distinction between "hybrid", "true", and "spurious" class actions. It eliminates these terms of art completely. In their stead, the rule creates three types of class action which are delineated on the basis of the consequences of the class action rather than the "jural" relationship of the members of the class.

The revision to Rule 23 has a practical sensibility which would be virtually destroyed if the judgment of the Court of Appeals be upheld. The consequence of dismissal would be to thrust individual shareholders into state courts to

¹ See also Professor Cohn's article on the New Federal Rules of Civil Procedure in the *Georgetown Law Journal*, Vol. 54, pages 1213 to 1228.

institute these actions thus encouraging hundreds of suits flung out across the country with the consequent likelihood of disparate judgments. The cost of prosecuting the claims would be enormous both to the defendants and to the plaintiffs. In fact a dismissal herein might well serve to render it economically impractical to attempt enforcement of the claims of the small shareholders injured by the defendants' illegal sale of their offices. The cost of investigating and pursuing an individual action is prohibitive for the small shareholder. Small shareholders can now obtain a just adjudication of their claims largely because of the economics of the class action device. The consequence of the Court of Appeals judgment could very well be to render Amended Rule 23 sterile as a workable procedural tool.

For all the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

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APPENDIX A.

Rule 23.

CLASS ACTIONS.

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or correspond-

ing declaratory relief with respect to the class as a whole;
or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any

member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom

allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966; eff. July 1, 1966.

APPENDIX B.

United States District Court, Eastern
District of Wisconsin.

Margaret E. Snyder, Also Known
as Peg Snyder,

Plaintiff,

v.

Harry L. Epstein and Benjamin
Marcus,

Defendants.

No. 66-C-329.

OPINION AND ORDER.

The complaint in this case was filed December 1, 1966. Defendants filed motions to dismiss the action and, in the alternative, to order that the action not be maintained as a class action. The complaint was amended and the amended version was received by this court on March 24, 1967. Affidavits in support of defendants' previous motions were filed, and on April 10, 1967, a hearing was held on these motions. Because of other similar (if not identical) cases pending in other circuits, it was agreed by the parties that this court should withhold decision on the motions until the Circuit Court of Appeals of the Eighth Circuit decided a matter there on appeal involving the same plaintiff as in this action and raising at least one of the questions raised here. The Eighth Circuit issued its opinion in **Snyder v. Harris**, 390 F. 2d 205, on February 27, 1968.

The allegations in this action are somewhat complex and require a rather lengthy summary. Essentially, plaintiff in this case alleges that she is a resident of the State

of Arizona; that defendants, Harry L. Epstein and Benjamin Marcus, are residents of Milwaukee, Wisconsin; that Missouri Fidelity Union Trust Life Insurance Company (hereinafter referred to as "Missouri Fidelity") is a corporation that issues and sells policies of life insurance; that National Western Life Insurance Company (hereinafter referred to as "National Western") is a Colorado corporation; that plaintiff was, and still is, the owner of 2,000 shares of Missouri Fidelity stock; that the bylaws of Missouri Fidelity provide for a Board of Directors consisting of fifteen directors; that the defendants, Harry L. Epstein and Benjamin Marcus, were directors of Missouri Fidelity and that on November 22, 1966, the market price of Missouri Fidelity stock was about \$2.63 per share; that some time prior to November 22, 1966, National Western submitted to directors of Missouri Fidelity a proposal to purchase all the shares owned by them for \$7.00 per share, conditioned, however, first upon the resignation of all the directors of Missouri Fidelity except four, and further that five nominees of National Western be elected as directors of Missouri Fidelity and that such nominees be also named and elected as a majority of the executive committee and of the investment committee of Missouri Fidelity; that on or about November 22, 1966, National Western entered into such an agreement with eight directors of Missouri Fidelity, including defendants, Harry L. Epstein and Benjamin Marcus, to pay them and their friends and relatives \$7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity then owned by them; that at a Board of Directors meeting held in St. Louis, Missouri, pursuant to such agreement, eight directors, including defendants, Harry L. Epstein and Benjamin Marcus, resigned as directors of Missouri Fidelity, and the nominees of National Western were named and elected as directors of Missouri Fidelity and as a majority of the executive committee

and of the investment committee of Missouri Fidelity; that four of the directors of Missouri Fidelity did not participate towards the effectuation of the aforesaid acts and did not resign; that three directors who also did not participate in the effectuation of the aforesaid acts did resign; that the aggregate amount paid by National Western for said 300,000 shares was approximately \$1,200,000.00 in excess of the market value of said shares and was a premium paid to said selling shareholders for the resignation of said directors and for obtaining control of the executive committee and the investment committee of Missouri Fidelity by National Western; that the conduct and acts of the eight directors, including defendants, Harry L. Epstein and Benjamin Marcus, who agreed to sell their shares and who resigned pursuant to such agreement, were a breach of trust and violation of their fiduciary duties as directors of Missouri Fidelity; that the class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states; that plaintiff brings this action on behalf of herself and all other shareholders of Missouri Fidelity similarly situated; that questions of law or fact herein are common to said class and claims of plaintiff are typical of the claims of said class of shareholders of Missouri Fidelity similarly situated; that plaintiff can and will adequately and fairly represent the interest of said class; and that the prosecution of separate actions by individual members of said class would risk inconsistent or varying adjudications which would establish incompatible standards of conduct for the parties opposing the said class.

Defendants reply to this complaint by moving to dismiss on five alternative grounds. The defendants contend that:

1. Plaintiff failed to state a claim upon which relief can be granted in an action as an individual shareholder;

2. Plaintiff did not state a claim upon which relief can be granted in a derivative action;

3. Plaintiff has failed to follow the requirements of Rule 19 of the Federal Rules of Civil Procedure by failing to join certain indispensable parties—the six other directors whose conduct is alleged as a breach of trust—and by failing to indicate who these other parties are and why they were not joined;

4. Plaintiff does not satisfy the requirements for the maintenance of a class action under Rule 23 of the Federal Rules of Civil Procedure; and

5. Plaintiff fails to satisfy the jurisdictional requirement of the federal district courts in diversity cases in that plaintiff's individual claim is not more than \$10,000.00.

I. Does plaintiff allege facts upon which relief can be granted?

To deal with defendants' contentions, of course, it must be assumed that all of plaintiff's factual allegations are true. Inferences from these facts must also be drawn in the light most favorable to plaintiff to determine whether a cause of action is pleaded.

The plaintiff in effect alleges that the defendants sold their corporate offices and control of the corporation in return for a premium of \$1,200,000.00 on the stock purchased from them and others. The sale of a corporate office gives rise to a cause of action for breach by such officer of the fiduciary duties owed to both the corporation and the stockholders. **Securities and Exchange Commission v. Insurance Securities**, 254 F. 2d 642 (9th Cir. 1958). Many courts take the position that this may be the basis for action by individual stockholders even though the action is sometimes denominated derivative. **Vine v. Ben-**

Official Finance Co., Inc., 374 F. 2d 627 (2d Cir. 1967); **Perlman v. Feldman**, 219 F. 2d 173 (2d Cir. 1955); **Borak v. J. I. Case Company**, 317 F. 2d 838 (7th Cir. 1963).

It is clear that one set of facts may give rise to a cause of action in favor of either the corporation or the individual stockholder or both. **Borak v. J. I. Case Company**, supra; **Brown v. Bullock**, 194 F. Supp. 207 (S. D. N. Y. 1961), aff'd 294 F. 2d 415 (2d Cir. 1961). The facts in this case appear to this court to present such a situation. Reasonable inferences can be drawn from the pleaded facts which support a cause of action for breach of trust either as to the individual stockholders who were not offered \$7.00 per share for their stock or as to the corporation whose controlling positions on the Board of Directors, executive committee, and investment committee were sold. Since the complaint could reasonably be read to state either an individual or a derivative cause of action, this court is of the opinion that defendants' motion to dismiss for failure to state a cause of action must be denied.

II. Has plaintiff failed to satisfy Rule 19?

Defendants further contend that plaintiff has failed to satisfy the requirements of Rule 19 of the Federal Rules of Civil Procedure by failing either to join the other directors who took part in the alleged sale or to supply their names and addresses and reasons why they were not joined. It is undisputed that eight directors were involved in the acts of which plaintiff complains, and that only two of such directors were made parties defendant in this action. The formal record in this case does not indicate the identity or location of any of the other directors. The briefs do refer to **Snyder v. Harris**, 268 F. Supp. 701 (E. D. Mo. 1967), aff'd 390 F. 2d 204 (8th Cir. 1968), wherein the same plaintiff, in an action

similar to this one, arising out of the same facts, sought to sue two other members of the Board of Directors. The courts therein held that Rule 23 did not allow the plaintiff in a class action to aggregate her claim with those of other class members whom she represented for purposes of satisfying the jurisdictional amount under § 1332, 28 U. S. C. The question of proper joinder under Rule 19 was never reached.

It appears to this court that such other directors are contemplated by the language of Rule 19 which states in relevant part:

“(a) **Persons to be Joined if Feasible.** A person . . . shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .”

It also appears that the 1966 change in the language of this rule has removed the necessity for the technical classification of a person as “necessary” or “indispensable” to the action but still directs the court to engage in a pragmatic weighing of the equities involved. *Barron & Holtzhoff, Federal Practice & Procedure*, §§ 511-512 (Wright ed., 1967 Supplement); *Imperial Appliance Corp. v. Hamilton Mfg. Co.*, 263 F. Supp. 1015 (E. D. Wis. 1967).

In the view of this court, the fact that plaintiff has not at this point joined or identified the other directors does not require dismissal of the complaint at this time. Rule 21 of the Federal Rules of Civil Procedure clearly allows the joinder of parties at any time in the proceed-

ings, subject to the discretion of the court. 3A Moore, Federal Practice, at 2905-2907 (2d ed. 1968); 2 Barron & Holtzhoff, Federal Practice and Procedure, at 212-213 (Wright ed.). Consequently, this court is of the opinion that plaintiff should comply with Rule 19 by either joining the remaining six directors or by identifying them and pleading the reasons why they are not joined.

III. Is this a proper class action?

Defendants further contend that plaintiff does not satisfy the requirements of Rule 23 for the maintenance of a class action. Plaintiff alleges that there are approximately 4,000 stockholders of Missouri Fidelity, but does not indicate how many of these are "similarly situated" to plaintiff in that they were not offered \$7.00 per share for their stock on or about November 22, 1966. Consequently, this court cannot at this time find that plaintiff represents a class "so numerous that joinder of all members is impracticable." In the interest of justice, the plaintiff should be permitted to amend her complaint to meet this requirement, if she can. It does appear, however, that there are questions of law or fact common to the persons plaintiff seeks to represent, that the claims of the plaintiff are typical of the claims of the shareholders who were not offered \$7.00 per share for their stock on or about November 22, 1966, and that plaintiff will fairly and adequately protect the interests of the class.

IV. Does this court have jurisdiction under 28 U. S. C., § 1332?

The next question to consider is whether this court has jurisdiction of this matter on the basis of the amount in controversy. Plaintiff contends that a total premium of \$1,200,000.00 was paid to the directors and their friends and relatives. She does not claim this entire amount is due and owing to her by virtue of the breach of trust

alleged. Rather, she claims, as this court reads the complaint, that the \$1,200,000.00 should be divided among the shareholders "similarly situated" to the plaintiff. It does not appear that plaintiff claims \$10,000.00 on her own behalf. Consequently, plaintiff, by herself, has failed to satisfy the jurisdictional requirements of 28 U. S. C., § 1332.

In the event plaintiff amends her complaint to bring herself within the scope of Rule 23, the question before the court will be whether aggregation of claims of the class will be permitted in order to satisfy the requirements of 28 U. S. C., § 1332. This question has already been extensively briefed by the parties. In the interest of expediting this controversy, and since the decision on this question could be dispositive of this controversy at this time, this court will express its opinion on this question.

There is a conflict of opinion among the circuits on the question of aggregation of claims in a class action. The Eighth Circuit in **Snyder v. Harris**, 390 F. 2d 204 (1968), has adopted the view that aggregation is not to be permitted. This position is based on the reasoning that the 1966 amendment of Rule 23 did not change the prior distinctions among various types of class actions. Consequently, the old distinctions of "true," "hybrid," and "spurious" class actions must be maintained, at least when dealing with the jurisdictional amount. On this reasoning, the action between Mrs. Snyder, plaintiff in the action before this court, and Charles Harris and Earl W. Kirchhoff, past directors in Missouri Fidelity, was dismissed.

The Fifth Circuit in **Alvarez v. Pan American Life Insurance Co.**, 375 F. 2d 992 (1967), has also held that separate claims could not be aggregated to make the jurisdictional amount required under the diversity statute, even if new Rule 23 relating to class actions were applied.

In the Fifth and Eighth Circuits, the courts were persuaded that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule-making power delegated to the Supreme Court by Congress, and that to permit the aggregation of claims would amount to increasing the jurisdiction of the court by the rule-making authority. These courts reason that by permitting the aggregation of separate and distinct claims in a class action, they would violate Rule 82 which provides in part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts"

The Tenth Circuit has also considered this question in **Gas Service Company v. Coburn**, 389 F. 2d 831 (1968), and has reached a different conclusion. Here a customer of the Gas Service Company instituted a class action to recover amounts charged by the Gas Service Company which were above the statutory rates authorized. It was undisputed that the amount claimed by the individual plaintiff was \$7.81. The Tenth Circuit, however, allowed aggregation of claims and refused to dismiss the suit. The court reasoned that the 1966 amendment to Rule 23 removed complex and inefficient distinctions within the concept of class actions. The court stated at page 834:

" . . . The Advisory Committee's Note, 39 F. R. D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as 'true,' 'hybrid,' and 'spurious.' 'In practice,' said the Committee, 'the terms "joint," "common," etc., which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain.' These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now

recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of 'true,' 'hybrid' and 'spurious' must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard."

The Seventh Circuit, of which this court is a part, has not passed on this question, but the subject has divided the judges of the Northern District of Illinois.

Judge Napoli in **Lesch v. Chicago & Eastern Illinois Railroad Company**, 279 F. Supp. 908 (N. D. Ill. 1968), held that the jurisdictional amount may not be satisfied by aggregating the claims of the entire class, but Judge Will in **Booth v. General Dynamics Corporation**, 264 F. Supp. 465, 470 (N. D. Ill. 1967), stated:

"The recent amendments to the Federal Rules of Civil Procedure have extinguished the tortured distinction between 'true' and 'spurious' class actions. New standards for determining whether a class action is maintainable were established under the new Rule 23. It is by these new standards, rather than under the outworn authorities cited by the present litigants, that we must determine whether this suit may be maintained as a class action, * * *."

In allowing the class action to proceed, Judge Will went on to say at page 472:

"* * * Without the class action device, the aggregation of claims necessary to meet the jurisdictional amount requirement would be so difficult that the perpetrators of illegal transactions such as are alleged here would enjoy something akin to immunity in the federal courts."

It appears to this court that the reasoning of the Tenth Circuit and of Judge Will is more useful and in

keeping with the position taken by the Advisory Committee. See Advisory Committee's Note to Rule 23 in 39 F. R. D. 69 at page 98. Also see Professor Charles Alan Wright's note in the 1967 Supplement, at 106, to 2 Barron & Holtzoff, Federal Practice and Procedure, § 569, wherein he stated:

"* * * It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. * * *"

Also see Professor Cohn's article on the New Federal Rules of Civil Procedure in the Georgetown Law Journal, Vol. 54, pages 1213 to 1228.

The purposes of class actions would be largely defeated, especially in the situation like this one before the court where a stockholder is seeking to recover for the breach of trust by officers and directors of the corporation, if it is held that only persons with a claim in excess of \$10,000.00 may institute a class action. With such reasoning, it is not inconceivable that corporate directors could be totally immune from suit in a federal court, although there could be literally hundreds of stockholders with a legitimate cause of action against the directors. Consequently, this court will permit aggregation of amounts where a class action is otherwise validly instituted.

It Is Therefore Ordered that defendants' motions to dismiss on the ground that plaintiff has failed to state a claim upon which relief can be granted be and they are hereby denied.

It Is Further Ordered that plaintiff be allowed twenty days from the date of this opinion and order to amend her complaint to satisfy the requirements of Rule 19 of the Federal Rules of Civil Procedure, and that plaintiff further be allowed to amend to allege facts sufficient to in-

yoke the jurisdiction of this court, either as in a class action pursuant to Rule 23 or as to plaintiff as an individual to satisfy the jurisdictional requirements of 28 U. S. C., § 1332. Upon failure to amend within such time, this action will be dismissed.

Dated at Milwaukee, Wisconsin, this 22nd day of October, 1968.

John W. Reynolds,
U. S. District Judge.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 117

THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and
All Others Similarly Situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the court of appeals (App.* 20-25) is reported at 389 F.2d 831. The opinion of the district court (App. 8-16) is not reported.

*"App." refers to the single appendix to the Briefs, separately bound.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1968 (App. 20). Petitioner's Petition for Rehearing and Application for Hearing En Banc thereof were denied on March 26, 1968 (App. 26-27). The certiorari jurisdiction of this court is invoked under 28 U.S.C. 1254 (1). The petition was filed herein on May 21, 1968 (App. 1).

QUESTION PRESENTED

Whether under Rule 23, *Federal Rules of Civil Procedure*, as amended in July, 1966, aggregation of several and distinct claims is now permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U.S.C. §1332, when aggregation was not allowed prior to such amendment?

STATUTE AND RULES INVOLVED

28 U.S.C. 1332 provides in pertinent part as follows:

"(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Amended Rule 23 of the *Federal Rules of Civil Procedure* is set forth in full in Appendix A hereto, pp. A1-A4.

Rule 82 of the *Federal Rules of Civil Procedure*, as amended February 28, 1966, effective July 1, 1966, provides in pertinent part as follows:

"These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein. . . ."

STATEMENT

An appeal was allowed by the court below from an order of the United States District Court for the District of Kansas, overruling petitioner's motion to dismiss a class action. The motion attacked the complaint for insufficiency of the jurisdictional amount required by 28 U.S.C. 1332, as amended (App. 5).

Respondent Otto R. Coburn, the only named plaintiff, resides in the vicinity of Arkansas City, Kansas. The petitioner is a Delaware corporation authorized to do business in Kansas. It markets natural gas to residents of the State of Kansas, including respondent Coburn. The complaint alleges that Coburn and other persons exceeding 18,000 in number reside outside of the city limits of various cities in the State of Kansas, and that he and other members of this class have purchased natural gas from petitioner continuously since 1954 (App. 2-3).

Complaint is made that petitioner has individually billed and collected from Coburn and other members of the class an illegal municipal franchise tax in addition to the proper rates payable otherwise. The complaint further alleges that the exact amount of the unlawful charges collected from all members of the class is unknown, but that

the aggregate total of such illegal charges which respondent seeks to recover for the class far exceeds the sum of \$10,000 (App. 4-5).

Petitioner moved to dismiss in the district court on the ground that the complaint failed to satisfy the \$10,000 jurisdictional amount required by 28 U.S.C. 1332. The motion to dismiss was accompanied by an affidavit showing that the total franchise tax collected from respondent Coburn from April, 1964 through February, 1966 amounted to \$7.81. At the hearing on petitioner's motion to dismiss, it was stipulated that counsel for respondent were not aware at that time of any member of the class whose individual claim would equal or exceed \$10,000 (App. 5, 6, 8, 17).

The trial court issued a memorandum in which it directed that an order be prepared and filed overruling appellant's motion to dismiss (App. 8-16). In its order of June 23, 1967, overruling the motion, the district court authorized an application for an interlocutory appeal under 28 U.S.C. 1292(b) (App. 17-18). Timely application therefor was made, leave to appeal was granted by the circuit court on July 26, 1967 (App. 1, 19-20) and notice of appeal was filed on August 1, 1967 (App. 18).

The circuit court, after stating that the claims in issue could not have been aggregated under former Rule 23, interpreted the 1966 amendment so as to now permit aggregation, and, accordingly, affirmed the order of the district court overruling petitioner's motion to dismiss (App. 22-23, 25).

The petition for a writ of certiorari to the court below was filed herein on May 21, 1968 and was granted on October 21, 1968 (App. 1).

ARGUMENT

I

The Opinion of the Court Below Holds That Procedural Rules Governing Federal Courts May Modify Their Statutory Jurisdiction Established by Congress

The opinion below sets forth premises which cannot possibly support the result reached, as the following quotations demonstrate:

"Because the claims of the individuals constituting the class in the case at bar are neither 'joint' nor 'common' this action under Rule 23 before amendment would not have been classified as a 'true' class action and aggregation of claims would not have been permitted." (App. 22-23)

"It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value." (App. 23).

"... it follows, under the new rule, that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy." (App. 25).

Once it is conceded, as above, that aggregation of the claims here was not permitted under former *Rule 23*, and that the *Rules* cannot enlarge jurisdiction, only verbal alchemy accounts for the result in the Circuit Court. Equally baffling is the Circuit Court's construction of cases deemed relevant to its decision. The lone precedent cited as actual authority for the holding below is *Gibbs v. Buck*, 307 U.S. 66, an injunction suit brought under former *Equity Rule 38* on behalf of members of an unincorporated association

by certain persons and firms, as representatives, all of whom had pecuniary interests involved in excess of the requisite jurisdictional amount. Furthermore, this Court held "They have a common and undivided interest in the matter in controversy in this class suit." 307 U.S. 66 at p. 74. No such community of interest is even arguably present in this action.

Since the respondent here and each member of his putative class would have separate contracts with petitioner, giving rise to varying amounts claimed and possibly also to individual set-offs and counterclaims, the only conceivable common element present is a question of law. The court below did not attempt to categorize this action under amended Rule 23 nor to characterize its nature for jurisdictional purposes, since it concluded that aggregation of claims of class members is now authorized whenever a class suit is appropriate under the amended rule (App. 25). By this process, several and distinct claims are procedurally converted into the equivalent of a joint or indivisible claim, and both substantive rights and federal jurisdiction are materially affected. The resulting problems and their implications are neither mentioned nor discussed in the opinion below.

We suggest that the decisive question can only be fairly stated and met along the following lines: *Whether federal jurisdiction, founded upon the matter in controversy prescribed by Congress, can be expanded by an interpretation of rules of practice which enlarges the permissible joinder of the number of matters in controversy triable in a particular action?* This unavoidable question, involving the relationship of federal courts and the Congress, was ultimately assumed in the decision below. It is to this unanswered question that we wish to direct attention here.

II

The Rules for Ascertaining Jurisdictional Amount in Federal Diversity Cases Are Independent of the Rules of Practice Adopted for the Federal District Courts

The right of access to the lower federal courts is only such as is provided by Congress.

"... Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. *Turner v. Bank of North America*, 4 Dall. 8, 10, 1 L.ed 718, 719; *United States v. Hudson*, 7 Cranch, 32, 3 L.ed. 259; *Sheldon v. Sill*, 8 How. 441, 448, 12 L.ed. 1147, 1150; *Stevenson v. Fain*, 195 U.S. 165, 49 L.ed 142, 25 Sup. Ct. Rep. 6. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . ." *Kline v. Burke Construction Co.*, 260 U.S. 226 at 234.

Congress has repeatedly restricted access to the lower federal courts by consistent upward revision of the requisite jurisdictional amounts in both diversity and federal question cases.

"From the time of the first Judiciary Act, Congress has used the requirement of a minimum amount in controversy as a method of restricting access to the lower federal courts, originally and by removal, in certain types of cases. And successive acts of Congress have progressively increased the requisite jurisdictional amount.

"Originally, diversity and alienage cases could not be brought in the federal courts unless the value of the matter in controversy exceeded \$500 exclusive of costs. This amount was raised in 1887 to \$2,000 plus, exclusive of interest and costs; by the Judicial

Code of 1911 to \$3,000 plus, exclusive of interest and costs; and by the Act of July 25, 1958 the amount in controversy must exceed \$10,000 exclusive of interest and costs.

"Jurisdiction over general federal question cases, granted to the federal courts for the first time in 1875, has undergone a similar history with the amount in controversy requirement increasing successively from an original \$500 to the present \$10,000." *Moore's Federal Practice*, 2nd ed., Vol. I, pp. 817-18.

The obvious Congressional intent has been noted by this Court and has led it to adopt a strict construction of the diversity statute.

"... From the beginning suits between citizens of different states, or involving federal questions could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . ." *Healy v. Ratta*, 292 U.S. 263 at pp. 269-70.

This restrictive congressional policy undoubtedly prompted the unchanged¹ stipulation of Rule 82 of the

1. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. *An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.*" Rule 82, as amended in 1966. The italicized portions represent additions to original Rule 82.

Federal Rules of Civil Procedure that nothing therein would be construed to extend or limit the jurisdiction of the district courts. Apart from the specific disclaimer of *Rule 82*, the rules do not purport to deal with jurisdictional standards. Those statutory standards have given rise to a body of case law wholly distinct from the practice rules in effect from time to time.

That the varying rules of practice must not be confused with jurisdictional boundaries has been the continuous teaching of this Court. In *Oliver et al. v. Alexander et al.*, 6 Peters (U.S.) 143, Mr. Justice Storey early considered the effect upon the Court's limited appellate jurisdiction of the admiralty practice permitting joinder of seamen's wage claims in the lower courts.

"... It is well known that every seaman has a right to sue severally for his own wages in the courts of common law; and that a joint action cannot be maintained in such courts by any number of the seamen for wages accruing under the same shipping articles for the same voyage. The reason is that the common law will not tolerate a joint action except by persons who have a joint interest, and upon a joint contract. If the cause of action is several, the suit must be several also. But a different course of practice has prevailed for ages in the Court of Admiralty in regard to suits for seamen's wages. It is a special favor, and a peculiar privilege allowed to them and to them only; and is confined strictly to demands for wages. The reason upon which this privilege is founded is equally wise and humane; it is to save the parties from oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament; in the expressive language of the maritime law, *velis levatis*. . . . A joint libel may therefore always be filed in the admiralty by all the seamen who claim wages for services rendered on the same voyage, under the same shipping articles. But although the libel is thus in form joint, the contract is always treated in the

admiralty according to the truth of the case, as a several and distinct contract with each seaman. . . .
6 Peters (U.S.) 145-46.

"... One seaman cannot appeal from the decree made in regard to the claim of another, for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners, or other respondents, is the sum or value of his own claim, without any reference to the claims of others. It is very clear, therefore, that no seaman can appeal from the District Court to the Circuit Court unless his own claim exceeds fifty dollars; nor from the Circuit Court to the Supreme Court unless his claim exceeds two thousand dollars. And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute. . . ." *6 Peters (U.S.) 147-148.*

Over one hundred years later, following the adoption of the initial *Federal Rules of Civil Procedure*, the inability of any rule of practice to modify statutory jurisdictional restrictions was as firmly settled as in Mr. Justice Storey's time.

"Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge nor modify substantive rights,' in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. *There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance,*

the inability of a court, by rule, to extend, or restrict the jurisdiction conferred by a statute." *Sibbach v. Wilson*, 312 U.S. 1 at p. 10 (Emphasis ours).

The concepts applicable to aggregation of claims for jurisdictional amount purposes have remained singularly constant. They are succinctly set forth in *Pinel v. Pinel*, 240 U.S. 594 at 596:

"The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Clay v. Field*, 138 U.S. 464, 479, 34 L.ed. 1044, 1049, 11 Sup. Ct. Rep. 419; *Troy Bank v. G. A. Whitehead & Co.*, 222 U.S. 39, 56 L.ed 81, 32 Sup. Ct. Rep. 9. . . ."

These concepts were specifically reviewed and re-affirmed by this Court in a class action brought under original Rule 23 of the Federal Rules in *Thomson v. Gaskill*, 315 U.S. 442 at pp. 446-47:

"Since the record does not contain the various agreements upon which the plaintiffs' action is founded, there is no basis for determining whether this is a suit 'in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount.' *Lion Bonding & Surety Co. v. Karatz*, 262 US 77, 86, 67 L.ed 871, 879, 43 S Ct 480; see *Shields v. Thomas*, 17 How (US) 3, 5, 15 L.ed 93, 94; *Troy Bank v. G. A. Whitehead & Co.* 222 US 39, 40, 41 56 L.ed 81, 82, 83, 32 S Ct 9; *Gibbs v. Buck*, 307 US 66, 74, 75, 83 L.ed 1111, 1116, 1117, 59 S Ct 725, or one in which 'the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy,'

Davis v. Schwartz, 155 US 631, 647, 39 L ed 289, 296, 15 S Ct 237; see Clay v. Field, 138 US 464, 479, 480, 34 L ed 1044, 1049, 1050, 11 S Ct 419; Russell v. Stansell, 105 US 303, 26 L ed 989. Aggregation of plaintiffs' claims cannot be made merely because the claims are derived from a single instrument, Pinel v. Pinel, 240 US 594, 60 L ed 817, 36 S Ct 416, or because the plaintiffs have a community of interest. Clark v. Paul Gray, Inc. 306 US 583, 83 L ed 1001, 59 S Ct 744. In a diversity litigation the value of the 'matter in controversy' is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. Wheless v. St. Louis, 180 US 379, 382, 45 L ed 583, 585, 21 S Ct 402; Oliver v. Alexander, 6 Pet (US) 143, 147, 8 L ed 349, 350."

In short, the jurisdictional foundation of every diversity action has heretofore invariably been determined by jurisdictional standards and not by rules of practice, regardless of their convenience to litigants or to the courts.

III

Nothing in Amended Rule 23 Authorizes, or Even Suggests an Expansion of Federal Jurisdiction, and the Court Below Erred in Holding to the Contrary

As previously mentioned, neither the original nor amended Rules, including *Rule 23*, purport to deal with federal jurisdiction, except for the disclaimer in *Rule 82*. It is apparent that amended *Rule 23* has been completely re-written (Appendix A hereto). It is probable that the categories of "true", "hybrid" and "spurious" class actions will be abandoned under the new rule in favor of "(b) (1)", "(b) (2)", and "(b) (3)" class actions. Of course, it is to be hoped that these new classifications will be more workable and convenient tools for administering federal class suits, whenever jurisdiction is present, but

they have no more bearing upon jurisdiction than any previous rule governing class suits.

It has been suggested that because of the possibility of the more binding effect of adjudications upon class members under the new rule, therefore the matter in controversy is likewise extended and, by reason thereof, so is federal jurisdiction.² The fallacy in this suggestion is apparent from a comparison with other rules dealing with joinder of claims and parties. Rule 20 authorizes the joinder in one action of parties whose claims are several, if arising out of the same transactions or occurrences when a common question of law or fact will also arise. Intervention upon substantially the same terms is allowed by Rule 24(b). We are unable to find even a suggestion that these liberal joinder provisions have enlarged diversity jurisdiction, although they may frequently enlarge the number of matters in controversy permissibly joined in suits thereunder. If these rules were interpreted to allow the aggregation of claims whenever joinder of parties is authorized by them, then the federal district courts would be overwhelmed with litigation and the Congressional restrictions upon their jurisdiction would be swept aside. But, if extension of permissible joinder of claims in controversy is sufficient ground for now aggregating claims under Rule 23 for jurisdictional purposes, then the same logic would sanction aggregation under Rules 20 and 24. In fact, a stronger case would exist for such aggregation because the latter rules deal with identified parties actually before the court whose controversies will necessarily be conclusively adjudicated by reason of their active participation.

2. Federal Jurisdiction—Diversity of Citizenship—Jurisdictional Amount in Class Actions, *Case Western Law Review*, Vol. 19, No. 4, p. 1101. See also, *Am. Bar Journal*, Vol. 54, July, 1968, p. 716, and Professor Wright's commentary at p. 106 of the 1967 pocket part to Vol. 2 of *Barron & Holtzoff's Federal Practice & Procedure*.

The Fifth and Eighth Circuit Courts of Appeal examined amended *Rule 23* on essentially similar facts and reached results opposite to that of the court below. *Alvarez v. Pan American Life Insurance Co., et al.*, 5 Cir., 375 F.2d 992, cert. den. 389 U.S. 827; *Snyder v. Harris*, 8 Cir., 390 F.2d 204, Judge Bell surely correctly concluded that "... we cannot assume that federal jurisdiction has been expanded in such a *sub silentio* manner." 375 F.2d at 995.

District Judge Frankel's comment³ on amended *Rule 23* is also enlightening. Especially pertinent is his remark that:

"... For better or for worse, Congress has exercised its unquestioned power to set a lower financial limit for most areas of federal jurisdiction. Unless there is at least one party entitled to open the door, the federal court remains closed. And there are many, at least, who see this as no tragedy, certainly so far as the diversity jurisdiction is concerned." 43 *F.R.D.* at p. 51.

Respondent here has available to him and to the thousands of members of his class the courts of Kansas which are authorized to entertain class actions⁴ and which are undeniably well-equipped to deal with the local questions of Kansas law involved in this cumbersome and time consuming action. We respectfully suggest that Congress intended that this litigation be conducted there and not in our over-burdened federal courts.

3. *Some Preliminary Observations Concerning Civil Rule 23*, by Marvin E. Frankel, 43 *F.R.D.* 39. Judge Frankel observes that "aggregation" may have been a misnomer. 43 *F.R.D.* at p. 48. This is clearly so whenever a joint or undivided right is in issue, since then only a single claim is asserted; regardless of the number of individuals interested in or affected by its assertion. "Aggregation" is, however, appropriately used and permitted whenever a single plaintiff has more than one claim which he combines in an action against a single defendant. *Moore's Federal Practice*, 2nd ed., Vol. I, pp. 882-83.

4. K.S.A. 60-223 is the same as former Federal Rule 23.

CONCLUSION

For the foregoing reasons the decision below should be reversed with directions that the motion to dismiss be sustained.

Respectfully submitted,

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APPENDIX A**Rule 23, Federal Rules of Civil Procedure, Amended
February 28, 1966, Effective July 1, 1966****Rule 23. Class Actions**

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1968.

No. 109.

MARGARET E. SNYDER Also Known as PEG SNYDER,
Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit.

BRIEF FOR THE RESPONDENTS.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit (A. 29-30)¹ is reported at 390 F. 2d 204 (8th Cir. 1968). The opinion of the United States District Court for the Eastern District of Missouri (A. 21-28) is reported at 268 F. Supp. 701 (E. D. Mo. 1967).

JURISDICTION.

The Judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 27, 1968 (A. 31). Petitioner's Petition for Rehearing, or in the

¹ "A" references are to the appendix filed herein by petitioner.

Alternative, to Transfer to the Court En Banc, was denied on March 22, 1968 (A. 43). Petitioner's Petition for a Writ of Certiorari was filed May 17, 1968 and was granted October 21, 1968 (A. 46, ... U. S. ..., 89 Sup. Ct. 232 (1968)). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether under Rule 23 of the Federal Rules of Civil Procedure, as amended February 28, 1966, effective July 1, 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where aggregation was not permitted prior to the amendment of Rule 23.

STATUTE AND RULES INVOLVED.

28 U. S. C., § 1332 (a) (1), provides:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;”

© Fed. R. Civ. P. 23, as amended February 28, 1966, effective July 1, 1966, is set forth in full in Appendix A attached hereto, *infra*, pp. A-1-A-4.

Fed. R. Civ. P. 82, as amended February 28, 1966, effective July 1, 1966, provides in pertinent part:

“These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.”

STATEMENT.

On November 23, 1966 petitioner filed her complaint in the United States District Court for the Eastern District of Missouri against the respondents herein and National Western Life Insurance Company (hereinafter referred to as National Western) as a class action pursuant to Fed. R. Civ. P. 23, as amended February 28, 1966, effective July 1, 1966, to recover judgment for \$1,200,000.00 (A. 6-10). Petitioner filed an amended complaint against only the respondents on March 14, 1967 (A. 14-18). The relevant portions of the amended complaint allege as follows:

Petitioner is a citizen of the State of Arizona and respondents are citizens of the State of Missouri; that there is diversity of citizenship and the amount in controversy exceeds \$10,000.00; that since prior to November 22, 1966, petitioner has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (hereinafter referred to as Missouri Fidelity) and owns 2,000 shares of said company; that the by-laws of Missouri Fidelity provide for a board of directors consisting of fifteen directors; that at all times relevant to this action, the respondents were members of said board of directors and the market price was about \$2.63 per share; that prior to November 22, 1966, National Western submitted to the Missouri Fidelity directors a proposal to purchase for \$7.00 per share all of the shares of Missouri Fidelity owned by them, on the condition that all directors of Missouri Fidelity, except four, resign as directors of Missouri Fidelity and that five nominees of National Western be elected directors of Missouri Fidelity, and that said nominees be designated and elected so as to constitute a majority of the executive and investment committees of Missouri Fidelity; that pursuant to said offer, on or about November 22, 1966, National Western entered into an agreement with eight Missouri Fidelity directors including respondents, to pay to

them and to friends and relatives of theirs \$7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity, and thereupon and in pursuance of such conduct said eight directors resigned as directors of Missouri Fidelity; and nominees of National Western were designated and elected as directors and as a majority of the executive and investment committees of Missouri Fidelity; that the aforesaid conduct and acts of the eight directors were a breach of trust and a violation of their duties as directors of Missouri Fidelity, and National Western procured said resignations and therefore paid or agreed to pay the eight directors who resigned, and their friends or relatives a premium of about \$1,200,000.00; and that the aggregate amount paid by National Western was approximately \$1,200,000.00 in excess of the market value of said shares and was a premium paid to the selling shareholders for the resignations of said directors who resigned and for obtaining control of the executive and investment committees of Missouri Fidelity.

The amended complaint prayed that judgment in the amount of \$1,200,000.00 be entered in favor of petitioner and the other individual shareholders (allegedly over 4,000 in number) according to their respective share holdings (A. 14-18; See also the opinion of the district court, A. 21-23, 268 F. Supp. 701 (E. D. Mo. 1967)).

On March 27, 1967, the respondents filed their Motion to Dismiss the amended complaint, alleging as one of their grounds "that the Court lacks jurisdiction as the amount in controversy is less than \$10,000.00" (A. 20).

The district court dismissed the amended complaint without prejudice on April 27, 1967, holding that the Court lacked jurisdiction in that the amount in controversy did not exceed \$10,000.00 (A. 21-28).² In arriving at this de-

² Since petitioner owned only 2,000 shares of Missouri Fidelity and the difference between the market price of the

cision, the court ruled that petitioner could not aggregate her claim with those of others in the class, because the petitioner's claim was separate and distinct from other persons in the class, and Rule 23, as amended, in no way purports to affect the jurisdiction of the court, nor change the character of a plaintiff's right. The district court further held that to construe Amended Rule 23, so as to confer jurisdiction, would constitute a violation of Fed. R. Civ. P. 82 (A. 23-28; 268 F. Supp. 701, 702-704 (E. D. Mo. 1967)).

The Court of Appeals for the Eighth Circuit in a Per Curiam opinion affirmed the district court "on the basis of the district court's soundly reasoned opinion and the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 827 (1967)" (A. 29; 390 F. 2d 204 (8th Cir. 1968)). In so holding, the court stated:

"We are not persuaded from our study of amended Rule 23 and the Advisory Committee notes to conclude that the amendment of the Rule was designed or did in fact change the substantive law proscribing the aggregation of separate and distinct claims in a class action for purposes of conferring jurisdiction under Section 1332" (A. 30; 390 F. 2d 204, 205 (8th Cir. 1968)).

After the denial of a Petition for Rehearing, or in the Alternative, to Transfer to the Court En Banc (A. 43), a petition for a writ of certiorari was filed in this Court on May 17, 1968, and the writ was granted on October 21, 1968 (A. 46; ... U. S. ..., 89 Sup. Ct. 232 (1968)).

stock at the time of the matter complained of (\$2.63 per share) and the price respondents received (\$7.00 per share) was \$4.37 per share, if petitioner cannot aggregate her claims with the other members of the class, the amount in controversy is only \$8,740.00.

ARGUMENT.

The Amendment of Rule 23 of the Federal Rules of Civil Procedure Does Not Permit the Aggregation of Several and Distinct Claims for the Purpose of Satisfying the Diversity Jurisdictional Amount Requirement of 28 U. S. C., § 1332.

The allegations of the petitioner's complaint and all of the surrounding facts and circumstances clearly indicate that her claim is separate and distinct from the other members of the class. Although there appear to be questions of law and fact common to the class, as petitioner contends (P. Br. 10),³ still in the end each member of the class would be required individually to prove his separate claim against respondents. Petitioner further evidences the separate and distinct character of her claim by filing two separate identical actions against different directors of Missouri Fidelity in other district courts. See, **Snyder v. Polland**, No. 66-1938-CC, U. S. Dist. Ct. C. D. Cal., July 31, 1967 and **Snyder v. Epstein**, 290 F. Supp. 652 (E. D. Wis. 1968) (P. Br. Appendix B).⁴ Moreover, a separate suit in the form of a derivative action has been filed by a dissident shareholder of Missouri Fidelity in the state courts of Missouri against all of the directors of Missouri Fidelity and others, including respondents. **Ritchey v. Missouri Fid./Union Trust Life**

³ The Brief for the Petitioner on the merits is herein referred to as "P. Br."

⁴ The District Court for the Central District of California in **Snyder v. Polland**, granted the defendants' motion to dismiss in an order entered July 31, 1967 inter alia on grounds of lack of jurisdictional amount. The District Court for the Eastern District of Wisconsin in **Snyder v. Epstein**, denied defendants' motion to dismiss in an opinion and order entered October 22, 1968, which is Petitioner's Appendix B.

Ins. Co., No. 280008, Circuit Ct. St. Louis County, Mo. Indeed, heretofore petitioner has recognized the separate and distinct nature of her claim,⁵ and Judge Harper in the memorandum opinion and order of the District Court and the Court of Appeals for the Eighth Circuit have so found (A. 27-28, 30; **Snyder v. Harris**, 268 F. Supp. 701, 704 (E. D. Mo. 1967), aff'd, 390 F. 2d 204 (8th Cir. 1968). Nevertheless, similar cases provide authority for asserting the separate and distinct character of petitioner's claim from those of other shareholders. See e. g., **Knapp v. Bankers Securities Corp.**, 17 F. R. D. 245 (E. D. Pa. 1954), aff'd 230 F. 2d 717 (3d Cir. 1956); **Ames v. Mengel Co.**, 190 F. 2d 344 (2d Cir. 1951); **Fisch v. General Motors Corp.**, 169 F. 2d 266 (6th Cir. 1948); **Goldberg v. Whittier Corp.**, 111 F. Supp. 382 (E. D. Mich. 1953); **Giesecke v. Denver Tramway Corp.**, 81 F. Supp. 957 (D. Del. 1949).

Traditionally, courts have held that separate and distinct claims of two or more plaintiffs may not be aggregated to arrive at the jurisdictional amount, whereas aggregation is permitted if the several plaintiffs unite to

⁵ In Appellant's Brief in the Court of Appeals in the case at bar, it is stated at p. 24: "The instant case demonstrates the impact of the revision. This cause of action formerly was known as a 'spurious' class action."

The petition for a Writ of Certiorari filed herein on May 17, 1968 states at p. 8: "Prior to the amendment of Federal Rule 23 the action here involved would have been classified as a 'spurious' class action and the aggregation of claims to satisfy the jurisdictional amount requirement of 28 U. S. C., Section 1332, would not have been permitted."

Of course, under former Fed. R. Civ. P. 23 (a) (3) (spurious class actions) the claims of the members of the class were separate and distinct, since former Fed. R. Civ. P. 23 (a) (3) provided that: "The right sought to be enforced for or against the class is several and there is a common question of law or fact affecting the several rights and a common relief is sought." 2 Barron & Holtzoff, **Federal Practice and Procedure**, § 569, at 321-24 (Wright ed. 1961); 3A Moore, **Federal Practice**, § 23.10, at 3442-44 (2d ed. 1968).

enforce a single title or right in which they have a common and undivided interest. **Troy Bank of Troy, Ind. v. G. A. Whitehead, & Co.**, 222 U. S. 39 (1911); **Pinel v. Pinel**, 240 U. S. 594 (1916); **Scott v. Frazier**, 253 U. S. 243 (1920); **Lion Bonding & Sur. Co. v. Karatz**, 262 U. S. 77 (1923); **Clark v. Paul Gray, Inc.**, 306 U. S. 583 (1939); **Thomson v. Gaskill**, 315 U. S. 442 (1942); **Fuller v. Volk**, 351 F. 2d 323 (3d Cir. 1965); **Alphonso v. Hillsborough County Aviation Authority**, 308 F. 2d 724 (5th Cir. 1962); 1 Barron & Holtzoff, *Federal Practice and Procedure*, § 24 at 114-17 (Wright ed. 1961); 1 Moore, *Federal Practice*, ¶ 10.97 at 889-95 (2d ed. 1964). The reason for that well established aggregation doctrine is that where the claims of two or more plaintiffs are separate and distinct, were it not for some multiple joinder device permitting the litigation in one single action for convenience and economy, two or more independent causes of action, each requiring the jurisdictional amount, would be required. However, if several plaintiffs are united to enforce a single title or right in which there is a common and undivided interest, a single cause of action could always have been maintained, because only that single right is in controversy.⁶

⁶ Support for this reasoning is found in a comparison of Fed. R. Civ. P. 19, 20 and 23. Under both former Rule 19, and as amended, all persons seeking to enforce a single title or right in which there is a common and undivided interest would be required to be joined and the court must order that they be made a party, if not joined. Former Rule 19 (a) and amended Rule 19 (d) also provide an exception to such required joinder in cases arising under Fed. R. Civ. P. 23, where one or more members of the class would be permitted to sue or be sued, provided the provisions of Rule 23 were complied with. Where, however, the claims are separate and distinct, joinder of the parties is not required, but merely permitted under both former and amended Fed. R. Civ. P. 20 (a), and under Fed. R. Civ. P. 20 (b), the court may order separate trials. Further, where permissive joinder of all of the members of the class is impracticable, because the class is so numerous, a class action under Fed. R. Civ. P. 23, both formerly and as amended can be maintained, provided there is compliance with Rule 23. Thus, in the

See, 1 Moore, **Federal Practice**, ¶ 10.97, at 889-90 (2d ed. 1964); 3 A Moore, **Federal Practice**, ¶ 23.13, at 3477-78 (2d ed. 1968).

Petitioner; however contends that because of the amendment of Fed. R. Civ. P. 23 to reflect the "consequences" of the class action, rather than the "jural" relationship of the members of the class, the settled doctrine of not permitting aggregation of separate and distinct claims is no longer applicable with respect to Fed. R. Civ. P. 23, as amended. Such contention completely ignores the concept of Federal diversity jurisdiction and in view of the history of the aggregation doctrine is totally fallacious.

The right to maintain an action in the Federal district court by reason of diversity of citizenship is not derived from the Constitution, but is permitted only insofar as is established by Congress. **Kline v. Burke Construction Co.**, 260 U. S. 226, 233-34 (1922); **Stevenson v. Fain**, 195 U. S. 165 (1904). For by Article III, § 1 "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U. S. Const., Art. III, § 1. By § 2 of the same Article, it is provided that "[t]he judicial Power shall extend . . . to Controversies . . . between Citizens of different States;" and that in such controversies, "the supreme Court shall have appellate Jurisdiction . . ." U. S. Const. Art. III, § 2.⁷ Thus,

former "true" class action, the concept of "totality" was present and aggregation was permitted. Such totality was not present in former "hybrid" and "spurious" class actions, and is not present in actions under Fed. R. Civ. P. 23 (b) (3) as amended.

⁷ U. S. Const., Art. III, in pertinent part provides as follows:

"Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of

only Congress has been granted authority to establish the diversity jurisdiction requirements of the lower Federal courts. However, since the inception of Federal diversity jurisdiction, Congress has always imposed a jurisdictional amount (gradually increasing the amount to the present \$10,000.00) as a method of restricting access to the lower Federal courts.⁸ 1 Moore, **Federal Practice**, ¶ 0.90, at 817-18 (2d ed. 1964); 1 Barron & Holtzoff, **Federal Practice and Procedure**, § 24, at 102 (Wright ed. 1961). Cognizant of the Congressional intent in imposing and increasing the jurisdictional amount, this Court has always called for a policy of strict construction of jurisdictional statutes. **Thomson v. Gaskill**, 315 U. S. 442, 446

the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

⁸ The Judiciary Act of 1789, § 11, 1 Stat. 78 (1789), Rev. Stat. § 629 (1875) was the first Congressional Act providing for Federal diversity jurisdiction and imposed a jurisdictional amount of \$500.00. Thereafter, in 1887 the jurisdictional amount was increased to \$2,000.00, Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552 (1887); in 1911 to \$3,000.00, Act of March 3, 1911, ch. 234, § 24, par. 1, 36 Stat. 1091 (1911); and in 1958 to \$10,000.00, Act of July 25, 1958, Pub. L. 85-554, 85th Cong., 2d Sess., 72 Stat. 415 (1958). The legislative history of the Act of July 25, 1958 contained at 2 U. S. Code, Cong. & Ad. News 3099-101 (1958) discloses that the reason for increasing the jurisdictional amount in 1958 was the increasing number of Federal cases between 1911 and 1958.

(1942); **Healy v. Ratta**, 292 U. S. 263, 270 (1934). In construing jurisdictional statutes, courts have developed a substantive law of jurisdiction, not to be confused with the procedural law dealing with the rules of pleading and practice.

The aggregation doctrine, with respect to jurisdictional amount, is one aspect of the substantive law of jurisdiction which has emerged from court decisions. As early as 1832, Mr. Justice Story applied the aggregation doctrine to the limited appellate jurisdiction of the Supreme Court in **Oliver v. Alexander**, 31 U. S. (6 Pet.) 143 (1832). In that case, the Federal Circuit Court had issued separate decrees in favor of certain officers and seamen (libelants) for wages and interest. The sums so decreed in no case exceeded \$900.00 and most of them were less than \$500.00. The assignee in whose hands the funds for payment were attached appealed to the Supreme Court. A motion to dismiss the appeal was filed on the ground that the amount in controversy was less than the required \$2,000.00 for jurisdiction in the Supreme Court. The Court found the claims to be separate and distinct and dismissed the appeal. In so holding, this Court stated:

“One seaman cannot appeal from the decree made in regard to the claim of another, for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners, or other respondents, is the sum or value of his own claim, without any reference to the claims of others. It is very clear, therefore, that no seaman can appeal from the District Court to the Circuit Court unless his own claim exceeds fifty dollars; nor from the Circuit Court to the Supreme Court unless his claim exceeds two thousand dollars. And the same rule applies to the owners or other respond-

ents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute." 31 U. S. (6 Pet.) 147-48 (1832).

Thereafter, the aggregation doctrine as applicable with respect to appellate jurisdictional amount was reiterated in numerous cases. See, e. g., **Stratton v. Jarvis**, 33 U. S. (8 Pet.) 4 (1834); **Spear v. Place**, 52 U. S. (11 How.) 522 (1850); **Rich v. Lambert**, 53 U. S. (12 How.) 347 (1851); **Shields v. Thomas**, 58 U. S. (17 How.) 3 (1854); **Seaver v. Bigelow**, 72 U. S. (5 Wall.) 208 (1867); **Paving Co. v. Mulford**, 100 U. S. (10 Otto) 147 (1879); **The Connemara**, 103 U. S. (13 Otto) 754 (1881); **Russell v. Stansell**, 105 U. S. (15 Otto) 303 (1882); **The Mamie**, 105 U. S. (15 Otto) 773 (1881); **Ex Parte Baltimore & Ohio R. R. Co.**, 106 U. S. (16 Otto) 5 (1882); **Farmers' Loan & Trust Co. v. Waterman**, 106 U. S. (16 Otto) 265 (1882); **Adams v. Crittenden**, 106 U. S. (16 Otto) 576 (1882); **Hawley v. Fairbanks**, 108 U. S. 543 (1883); **Stewart v. Dunham**, 115 U. S. 61 (1885); **Henderson v. Wadsworth**, 115 U. S. 264, 276 (1885); **Gibson v. Shufeldt**, 122 U. S. 27 (1887); **Clay v. Field**, 138 U. S. 464 (1891); **Ogden City v. Armstrong**, 168 U. S. 224 (1897).

At least as early as 1893, the aggregation doctrine was applied by this Court to the jurisdiction of the lower Federal courts in **Walter v. Northeastern R. R. Co.**, 147 U. S. 370 (1893), and has been preserved by many decisions of this Court. **Wheless v. St. Louis**, 180 U. S. 379 (1901); **Troy Bank of Troy, Ind. v. G. A. Whitehead**, 222 U. S. 39 (1911); **Rogers v. Hennepin County**, 239 U. S. 621 (1916); **Pinel v. Pinel**, 240 U. S. 594 (1916); **Scott v. Frazier**, 253 U. S. 243 (1920); **Lion Bonding & Sur. Co. v. Karatz**, 262

U. S. 77 (1923); **Sovereign Camp, Woodmen of the World v. O'Neill**, 266 U. S. 292, 295, (1924); **Clark v. Paul Gray, Inc.**, 306 U. S. 583 (1939);⁹ **Gibbs v. Buck**, 307 U. S. 66 (1939); **Buck v. Gallagher**, 307 U. S. 95 (1939); **Thomson v. Gaskill**, 315 U. S. 442 (1942). As eventually developed, the aggregation doctrine is delineated by the following statement in **Troy Bank of Troy, Ind. v. G. A. Whitehead**, 222 U. S. 39, 41 (1911):

“When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount.”¹⁰

The history of the aggregation doctrine, therefore, leads to the inescapable conclusion that the doctrine is not tied to the Federal Rules of Civil Procedure.

It was not until June 19, 1934, more than a century after the aggregation doctrine originated, that Congress gave the Supreme Court power to enact the Federal Rules of Civil Procedure. Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064 (1934). Thereafter, when the Federal Rules of Civil Procedure were promulgated, the aggregation doctrine was applied to all multiple joinder devices, under the Federal rules, which permitted two or more parties or claims to be united in a single suit. Thus, the doctrine

⁹ In **Clark v. Paul Gray, Inc.**, 306 U. S. 583 (1939), this Court on its own initiative applied the aggregation doctrine to find the jurisdictional amount lacking in the lower court. Previously, this Court had applied the aggregation doctrine without motion by a party, in a case of appellate jurisdiction in **Ogden City v. Armstrong**, 168 U. S. 224 (1897).

¹⁰ Most of the cases heretofore cited express the aggregation doctrine in comparable language. Language almost identical in form was employed in **Pinel v. Pinel**, 240 U. S. 594, 596 (1916).

has been applied with respect to cases of permissive joinder under Fed. R. Civ. P. 20; **Eagle Star Ins. Co. v. Maltes**, 313 F. 2d 778 (5th Cir. 1963); **Aetna Ins. Co. v. Chicago, R. I. and Pacific R. R. Co.**, 229 F. 2d 584 (10th Cir. 1956); **Manufacturers Cas. Ins. Co. v. Coker**, 219 F. 2d 631 (4th Cir. 1955); **Fechheimer Bros. Co. v. Barnwasser**, 146 F. 2d 974 (6th Cir. 1945); actions permitting joinder of claims under Fed. R. Civ. P. 18; **Alberty v. Western Sur. Co.**, 249 F. 2d 537 (10th Cir. 1957); causes dealing with real parties in interest under Fed. R. Civ. P. 17 (a) and intervention under Fed. R. Civ. P. 24; **Phoenix Ins. Co. v. Woosley**, 287 F. 2d 531 (10th Cir. 1961); **United Steelworkers of America v. New Park Min. Co.**, 169 F. Supp. 107, 113-14 (D. Utah 1958), reversed on other grounds, 273 F. 2d 352 (10th Cir. 1959); as well as class actions under former Fed. R. Civ. P. 23; **Fuller v. Volk**, 351 F. 2d 323 (3d Cir. 1956); **Alfonso v. Hillsborough County Aviation Authority**, 308 F. 2d 724 (5th Cir. 1962); **Troup v. McCart**, 238 F. 2d 289 (5th Cir. 1956); **Matlaw Corp. v. War Damage Corp.**, 164 F. 2d 281 (7th Cir. 1947).¹¹ Accordingly, since the aggregation doctrine attaches no special significance to class actions under Rule 23, but applies in all instances where two or more parties or claims are united in a single suit, it is inconceivable that the mere amendment of Rule 23 has ipso facto abrogated the aggregation doctrine with respect to class actions as petitioner contends.

Certainly, to allow the amendment of Rule 23 to confer jurisdiction where prior to the amendment there was none, contemplates permitting court made rules of

¹¹ With respect to class actions under former Fed. R. Civ. P. 23, the multiple joinder device particularly pertinent to the instant case, aggregation of claims to meet jurisdictional amount was permitted in "true" class actions, in which the right to be enforced was joint or common, but not in "hybrid" or "spurious" class actions in which there was no joint interest or right. 2 Barron & Holtzoff, **Federal Practice and Procedure**, § 569, at 321-22 (Wright ed. 1961).

procedure to modify and enlarge the statutory jurisdiction of Federal courts. But such ability of the Federal Rules of Civil Procedure to expand jurisdiction would directly conflict with Fed. R. Civ. P. 82, as well as decisions of the courts. **Sibbach v. Wilson & Co.**, 312 U. S. 1, 10 (1941); **United States v. Sherwood**, 312 U. S. 584, 589-90 (1941); **Sturgeon v. Great Lakes Steel Co.**, 143 F. 2d 819, 822 (6th Cir. 1944).¹²

Indeed, recent judicial decisions recognizing the jurisdictional nature of the aggregation doctrine have held that the amendment of Fed. R. Civ. P. 23 does not abrogate the doctrine that separate and distinct claims may not be aggregated. **Snyder v. Harris**, 268 F. Supp. 701 (E. D. Mo. 1967), aff'd, 390 F. 2d 204 (8th Cir. 1968); **Alvarez v. Pan American Life Ins. Co.**, 375 F. 2d 992 (5th Cir.), cert. denied, 389 U. S. 827 (1967); **Lesch v. Chicago & E. Ill. R. R. Co.**, 279 F. Supp. 908 (N. D., Ill. 1968); **Pomierski v. W. R. Grace & Co.**, 282 F. Supp. 385 (N. D., Ill. 1967); **DeLorenzo v. Fed. Dep. Ins. Corp.**, 259 F. Supp. 193, 195 n. 5 (S. D. N. Y. 1966).¹³

¹² In **Sibbach v. Wilson & Co.**, 312 U. S. 1, 10 (1941), this Court stated:

"There are other limitations upon the authority to prescribe rules which might have been but were not mentioned in the Act [of June 19, 1934]; for instance, the inability of a court by rule to extend or restrict the jurisdiction conferred by a statute."

The same year, the Supreme Court again stated in **United States v. Sherwood**, 312 U. S. 584, 589-90 (1941):

"An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. at L. 1064, chap. 651, 28 U. S. C. § 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of Federal Courts."

¹³ Since the actual decision in **DeLorenzo v. Fed. Dep. Ins. Corp.**, 259 F. Supp. 193 (S. D. N. Y. 1966), was based on former

In *Alvarez v. Pan American Life Ins. Co.*, *supra*, one appellant owned an insurance contract issued by appellee in the amount of \$1,000.00. The Castro government expropriated appellee's assets in Cuba and for this reason payment on the contract was refused. Said appellant's suit was based on a claim that a bonus accrued later under the contract, and was for the amount due him, and such sums as were due other Cuban Nationals holding contracts with similar bonus provisions. The class was said to include more than 5,000 such contract holders. The second appellant was the holder of an insurance contract with appellee in the amount of \$5,000.00. He sought his contract rights and those of all other Cuban National policyholders similarly situated. Both actions were dismissed by the district court for lack of jurisdictional amount. The Court of Appeals for the Fifth Circuit, unanimously affirmed the district court, stating:

"In sum, it would appear that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule making power delegated to the Supreme Court by Congress. It follows that the principle is valid and subsisting notwithstanding new Rule 23."¹⁴ 375 F. 2d 992, 996 (5th Cir. 1967).

Fed. R. Civ. P. 23, the court's comments on application of the aggregation doctrine to amended Rule 23 was a matter of dictum.

¹⁴ Judge Frankel, U. S. District Judge for the Southern District of New York, approved the *Alvarez* decision at the Eight Circuit's Judicial Conference, September 18, 1967 in the following manner:

"... The result [in *Alvarez v. Pan American Life Ins. Co.*] is debatable, but I suggest it is correct. While there appeared to be questions common to the class, each policyholder would evidently be required in the end to prove his separate claim individually. There was no certainty or necessity that all of the claims would have to be resolved one way. It would be artificial, and erroneous as a matter of

In **Pomierski v. W. R. Grace & Co.**, 282 F. Supp. 385 (N. D. Ill. 1967) the court dismissed Count I of plaintiff's complaint for lack of jurisdictional amount, refusing to allow plaintiff to aggregate her claims with other members of the class. After citing and quoting from **Alvarez v. Pan American Life Ins. Co.**, *supra*, and the district court opinion in the instant case, the court stated:

"If I were to accept plaintiff's position regarding aggregation, I would be acting in violation of Rule 82 and of well established precedents indicating the importance of the nature of the interests asserted in a class action when aggregation is sought (cit. omitted).

* * * * *

"* * * As an additional reason why this determination should not be altered, it must be noted that the principles which have heretofore governed the question of aggregation in class actions have also applied in non-class suits involving multiple plaintiffs (cit. omitted). If I were to hold that aggregation in a class suit is dependent solely upon compliance with Rule 23, that would create one rule for aggregation in class suits and a different rule in ordinary, multiple plaintiff actions involving the same type of claims." 282 F. Supp. 385, 391 (N. D. Ill. 1967).

See also **Lesch v. Chicago & E. Ill. R. R. Co.**, 279 F. Supp. 908, 911-12 (N. D. Ill. 1968).

substance, to treat the sum of the claims as a unitary and indivisible 'amount in controversy.'

"... For better or for worse, Congress has exercised its unquestioned power to set a lower financial limit for most areas of federal jurisdiction. Unless there is at least one party entitled to open the door, the federal court remains closed. And there are many, at least, who see this as no tragedy, certainly so far as the diversity jurisdiction is concerned. Frankel, **Some Preliminary Observations Concerning Civil Rule 23**, 43 F. R. D. 39, 50-51 (1967).

Contrary to the above authority are the cases of **The Gas Service Co. v. Coburn**, 389 F. 2d 831 (10th Cir. 1968); **Booth v. General Dynamics Corp.**, 264 F. Supp. 465 (N. D. Ill. 1967); and **Snyder v. Epstein**, 290 F. Supp. 652 (E. D. Wis. 1968). Respondents submit that those cases are erroneously decided. **The Gas Service Co.** case, upon which petitioner places great reliance, cites only one precedent involving federal jurisdiction in diversity class actions, **Gibbs v. Buck**, 307 U. S. 66 (1939), as authority for its holding. In **Gibbs v. Buck**, however—an injunction suit under former Equity Rule 38 on behalf of members of an unincorporated association, in which each representative of the association possessed the requisite jurisdictional amount—aggregation was permitted, because there was a common and undivided interest in the matter in controversy. 307 U. S. 66 at 74 (1939). See also, **Buck v. Gallagher**, 307 U. S. 95, 103 (1939).¹⁵ Nothing within the holding of **Gibbs v. Buck** purported to authorize the aggregation of claims in the absence of such common and undivided interest. This is borne out by **Clark v. Paul Gray, Inc.**, 306 U. S. 583 at 588-89 (1939), decided the same day and citing **Gibbs v. Buck**, where aggregation was not permitted because there was not shown a joint and undivided interest in the subject matter of the suit. Thus, the Tenth Circuit in **The Gas Service Co.** case, has misconstrued the decision of **Gibbs v. Buck**, which decision is contrary to

¹⁵ **Hilliker v. Grand Lodge K. P.**, 112 F. 2d 382, 384 (6th Cir. 1940), commenting upon the cases of **Gibbs v. Buck** and **Buck v. Gallagher**, states:

"The recent decisions of the Supreme Court in **Gibbs v. Buck** . . . and **Buck v. Gallagher** . . . do not alter the rule governing aggregation, for the court was careful to point out in each of its opinions that the members of the Association there complaining had each a common and undivided interest in the right which they sought to protect from the effects of the State Statute there assailed, and the dissenting opinion gives emphasis to this basis for decision. . . ."

the holding of **The Gas Service Co.** case and in fact supports the respondents herein. The only other authority cited by **The Gas Service Co.** case as comfort for its holding, **Provident Tradesmen's Bank & Trust Co. v. Patterson**, 390 U. S. 102 (1968), is totally inapposite, since the **Provident Tradesmen's Bank & Trust Co.** case dealt neither with Federal Jurisdiction nor amended Rule 23, but rather amended Fed. R. Civ. P. 19, as to findings of "indispensability".

Moreover, **Booth v. General Dynamics Corp.**, 264 F. Supp. 465 (N. D. Ill. 1967), also relied upon by petitioner, erroneously ignores the independent determination to be made as to whether a class action is properly maintained as distinguishable from the independent determination of whether the \$10,000.00 minimum amount is in controversy.¹⁶ Further, the **Booth** case ties the aggregation

¹⁶ The district court in **Lesch v. Chicago & E. Ill. R. R. Co.**, 279 F. Supp. 908, 911 (N. D. Ill. 1968), probably recognizing the error of **Booth v. General Dynamics Corp.**, cites the **Booth** case as contrary to the following statement:

"Nevertheless, the determination of whether a class action is properly so maintained, must be made independently of the determination of whether the requisite \$10,000 minimum amount is in controversy."

Additionally, **Lesch v. Chicago & E. Ill. R. R. Co.**, points out the nexus between former and amended Fed. R. Civ. P. 23, with respect to aggregation in the following manner at p. 912, n. 2:

"2. Rule 23 of the Federal Rules of Civil Procedure, as revised is sometimes said to have obliterated the distinction between true, hybrid and spurious class actions. This is true only where the question is, whether a class action is properly so maintained or whether the judgment is binding upon all members of the class. In determining whether the minimum jurisdictional amount is in controversy, a District Court must treat any application for a class action as a case of multiple joinder of parties. Insofar as 'true', 'hybrid', and 'spurious' characterize the nature of the right being enforced, they remain as useful analytical terms, even after the revision to Rule 23, where the question as to jurisdictional amount is raised."

doctrine solely to class actions, whereas it has been shown that the aggregation doctrine applies equally in non-class suits involving multiple parties.¹⁷

Insofar as **Snyder v. Epstein**, 290 F. Supp. 652, 657-58 (E. D. Wis. 1968), relies as the basis for its reasoning, on **The Gas Service Co. v. Coburn** and **Booth v. General Dynamics Corp.**, cases, respondents suggest that such reliance is misplaced.

Additionally, all three of the cases (**The Gas Service Co. v. Coburn**; **Booth v. General Dynamics Corp.**, and **Snyder v. Epstein**) in one fashion or another adopt a convenience or economy approach by asserting that the utility of amended Rule 23 would be defeated, if aggregation of the separate and distinct claims were not permitted. Such a convenience or economy approach, however, is invalid for three reasons:

(1) Under the aggregation doctrine convenience or economy can be no justification for permitting separate and distinct claims joined in one suit to be aggregated;

(2) Application of the aggregation doctrine to amended Rule 23 in no way perpetuates distinctions between "true", "hybrid", and "spurious", since each suit brought under amended Rule 23 requires a new determination as to whether the claims are separate and distinct; and

(3) Federal courts have always been closed to those multitudinous litigants, who, where aggregation is not permitted, lack the jurisdictional amount. Their recourse has been in the state courts.

¹⁷ That the aggregation doctrine is applicable to non-class suits involving multiple parties was one of the reasons for the holding of **Pomierski v. W. R. Grace & Co.**, 282 F. Supp. 385, 391 (N. D. Ill. 1967).

Petitioner in her conclusion, asserts such a convenience or economy argument by stating that "The consequence of dismissal would be to thrust individual shareholders into state courts to institute these actions thus encouraging hundreds of suits flung out across the country with the consequent likelihood of disparate judgments. The cost of prosecuting the claims would be enormous both to the defendants and to the plaintiffs" (P. Br. 16-17). Petitioner's conclusion is invalid for the three reasons set out above. In addition, it should be noted that petitioner can bring a class action in Missouri under Mo. Sup. Ct. Rule 52.08, which is the same as former Fed. R. Civ. P. 23, and avoid having "hundreds of suits flung out across the country."

Petitioner's argument, moreover, is misplaced in two other ways. First, the case of **Texas Employers Ins. Assn. v. Felt**, 150 F. 2d 227 (5th Cir. 1945), is not pertinent to the case at bar, since **Alvarez v. Pan American Life Insurance Co.**, 375 F. 2d 992 (5th Cir. 1967), also out of the Fifth Circuit, is a subsequent case directly involving the question here presented. In any event, the question here presented is not whether a suit under Fed. R. Civ. P. 23 (b) (3), which binds all of the members of the class, is as a procedural matter properly maintainable,¹⁸ but rather whether Rule 23, as amended,

¹⁸ **Texas Employers Ins. Assn. v. Felt**, 150 F. 2d 227, 231 (5th Cir. 1945), as applied by petitioner to the instant case, decided whether a single suit could be maintained under Fed. R. Civ. P. 20. In so deciding, the court also commented that Fed. R. Civ. P. 20 in and of itself "does not affect jurisdiction." 150 F. 2d at 231. This respondents do not deny. However, respondents contend that the Federal Rules of Civil Procedure cannot be applied in such a manner as to extend jurisdiction. Clearly, the court in **Texas Employers** realizes this as it states at 150 F. 2d 232: "If as we think no rule of procedure requires this suit to be split into separate parts, let us see if federal jurisdictional limitations demand it; if so, procedural convenience must yield to jurisdictional necessity" (Emphasis supplied).

can so operate as to extend jurisdiction, by permitting aggregation of separate and distinct demands where prior to the amendment such aggregation was not permitted.

Secondly, petitioner misconstrues the effect of Fed. R. Civ. P. 23 (b) (3), as amended, which makes the members of the class bound by the judgment unless they exclude themselves under subdivision (c) (2) of the rule.¹⁹ Thus, petitioner states: "How is it possible to say in the instant case that the 'amount in controversy' does not exceed \$10,000 where there could be one judgment in excess of \$1,000,000 binding the whole class and in which members of the class would be bound (unless they exclude themselves as above mentioned) regardless whether or not they joined in the lawsuit?" (P. Br. 11). Of course, this statement is erroneous to begin with, because even if the members of the class had been joined as parties under Fed. R. Civ. P. 20, where they would also have been bound by the judgment, the aggregation doctrine would still apply. Thus, it makes no difference whether Rule 23, as amended, now makes the members of the class bound by the judgment; what matters is whether the demands of the members of the class are separate and distinct. Further, were petitioner's view of amended Rule 23 (b) (3) adopted, all sorts of confusion would be created in the district courts, for "at the threshold point when the question of jurisdiction must be determined, it cannot be determined with certainty that there will ever be even an 'aggregate' in excess of \$10,000."²⁰

¹⁹ Some commentators have found the binding effect of the judgment under amended Fed. R. Civ. P. 23 (b) (3) noxious to the individual nature of our judicial system. See e. g., Supplemental Report, **Committee on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit**, 37 F. R. D. 71 (1965).

²⁰ Consider, for example, the situation where the class is made up of 100 persons each having a claim of \$110.00. If ten persons decide to be excluded, the court would not have the requisite \$10,000.00 jurisdictional amount, even if arguing, aggregation were permitted.

Frankel, **Some Preliminary Observations Concerning Civil Rule 23**, 43 F. R. D. 39, 50-51 (1967). This right of members of the class to request exclusion is proof that Fed. R. Civ. P. 23 (b) (3), as amended, did not change the character of a plaintiff's right. See, Notes of the Advisory Committee on Rules, 28 U. S. C. A., Fed. R. Civ. P. 23, as amended February 28, 1966, effective July 1, 1966, at p. 71 (Cumulative Pocket Part 1967).

Accordingly, respondents submit that nothing short of a total overruling of the long standing aggregation doctrine can logically support petitioner's position. But to do so will greatly expand federal jurisdiction; thereby further taxing an already overly burdened Federal judiciary.²¹ The decision below, in accord with the intention of Congress to limit rather than expand Federal diversity jurisdiction, should be affirmed.

CONCLUSION.

The decision below was proper under the facts alleged in the complaint and consonant with the well established doctrine that separate and distinct demands cannot be aggregated for purposes of jurisdictional amount, and also consistent with the amendment of Fed. R. Civ. P. 23, and with the prohibition of Fed. R. Civ. P. 82. Respondents submit that substantially more than mere "ancient learning" will have to be forgotten,²² if the aggregation

²¹ There has been much concern in the last decade over the increased workload of the Federal courts. Such increased workload prompted increasing the jurisdictional amount to \$10,000.00 in 1958. See 2 U. S. Code Cong. & Ad. News 3099-101 (1958). Just two years later, Mr. Chief Justice Warren noted only a slight effect of the increased \$10,000 jurisdictional amount on the workload. Warren, **Address at the Annual Meeting of the American Law Institute**, May 18, 1960, 25 F. R. D. 213-14 (1960).

²² See, 2 Barron & Holtzoff, **Federal Practice and Procedure** § 569 (Supp., p. 89, 1966).

doctrine is no longer applicable. For all of the foregoing reasons, it is respectfully submitted that the judgment of the court below be affirmed.

Respectfully submitted,

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APPENDIX A.

Rule 23.

CLASS ACTIONS.

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or correspond-

ing declaratory relief with respect to the class as a whole;
or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any

member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and

that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

JAN 9 1969

JOHN F. DAVIS, CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1968.

No. 117

**THE GAS SERVICE COMPANY,
Petitioner,**

VS.

**OTTO R. COBURN, on Behalf of Himself and
• All Others Similarly Situated,
Respondent.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT**

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

ARGUMENT

I.

**The Decision by the Court of Appeals Does Not
Materially Affect Federal Jurisdiction
or Substantive Rights.**

Petitioner contends that "the opinion of the Court of Appeals holds that procedural rules governing Federal

courts may modify their statutory jurisdiction established by Congress." In order to support its argument, petitioner assumes that the opinion of the Court of Appeals does in fact extend federal jurisdiction contrary to the provisions of Rule 82.¹ Respondent has never, and does not now, contend that the Federal courts, by promulgation of rules of procedure, can extend the jurisdiction conferred by statute. Indeed, we agree that the Federal courts are powerless to do so. *Sibbach v. Wilson*, 312 U.S. 1 at p. 10. It is equally clear, however, that Federal courts are not powerless to make decisions affecting jurisdiction, as this Court held in *Venner v. Great Northern Railway Company*, 209 U.S. 24 at p. 35:

"The jurisdiction of the circuit court is prescribed by laws enacted by Congress in pursuance of the Constitution, and this court by its rules has no power to increase or diminish the jurisdiction thus created, though it may regulate its exercise in any manner not inconsistent with the laws of the United States."

Interwoven into the question of whether the opinion of the Court of Appeals in this matter extends federal jurisdiction, and necessary to a determination of the question presented, is the effect, if any, which this decision has on substantive rights as raised by petitioner. Petitioner does not define or explain what substantive rights are involved, or to what party the rights extend. We can only assume that petitioner is referring to substantive rights of at least one of the parties and that the decision by the Court of Appeals in this case is contrary to the prohibition of the Enabling Act of June 19, 1934, which directed that rules of practice for district courts, "shall neither

1. Federal Rules of Civil Procedure, Rule 82, provides in pertinent part: "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein. . ."

abridge, enlarge nor modify the substantive rights of any litigant." *Mississippi Publishing Corporation v. Murphree*, 326 U.S. 438.

There is no question but that the concept of aggregation of claims for jurisdictional amount purposes was established prior to the adoption of the *Rules of Civil Procedure for District Courts* in 1938. *Pinel v. Pinel*, 240 U.S. 594, sets forth the rule regulating the circumstances under which aggregation of claims was permissible in joinder actions. Subsequent to *Pinel*, and following the adoption of the *Rules of Civil Procedure*, a vast number of cases were decided construing original Rule 23 in which the question of aggregating claims for purposes of jurisdictional amount was involved. The categories "true," "spurious" and "hybrid," and the terms used in connection with each category, evolved from the multitude of decisions construing Rule 23. Aggregation of claims was allowed only in "true" class actions which involved interests or rights of claimants that were said to be common and undivided. *Thomson v. Gaskill*, 315 U.S. 442. Aggregation was prohibited in "spurious" and "hybrid" actions, which involved interests or rights that were said to be separate and distinct. The more important of these decisions are cited in *Thomson v. Gaskill*, *supra*.²

Petitioner's position seems to be that these cases represent substantive law, having been decided according to statutory jurisdiction standards, and that substantive law is not subject to change or modification by decisions interpreting the *Rules of Civil Procedure*. We come then to the crux of petitioner's contention. Is the rule or law concerning aggregation of claims substantive or procedural? Unfortunately, there is no clear line of distinction

2. See also pages 11 and 12 of petitioner's brief.

between these two areas. In an effort to distinguish these areas this Court has said:

"The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law, and for justly administering remedy and redress for disregard or infraction of them."³

There is no question that Congress and only Congress has the power to establish the amount requisite to federal jurisdiction. The Court of Appeals obviously was aware of this limitation upon the rule-making power of Federal courts when it said in the opinion, in the case at bar:

"It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law, and that as a consequence no rule can lift or lower the \$10,000 restriction upon federal jurisdiction." (A. 23)

Conversely, Congress has never seen fit to enact any statute respecting aggregation of claims. That question has been left solely to the Courts for determination. Prior to the amendment of Rule 23, aggregation of claims was allowed under certain circumstances and prohibited under other circumstances entirely by judicial decision. The jurisdictional amount limitation was established for the Courts by Congress. The Courts, by case decisions, determined the judicial process for enforcing the rights and administering the remedy. This would appear to be procedural as opposed to substantive, and as such, clearly outside the prohibition expressed in the Enabling Act as well as the test established in *Sibbach* and followed in *Hanna*.

The Court of Appeals considered the question of whether the application of the concept of aggregation of

3. *Sibbach v. Wilson*, 312 U.S. 1 at p. 14; *Hanna v. Plumer*, 380 U.S. 460 at p. 464.

claims was procedural or substantive. After reflecting upon this Court's decision in *Provident Tradesmen Bank and Trust Co. v. Patterson*, 390 U.S. 102, the Court of Appeals said:

"Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, *Gibbs v. Buck*, supra, and it follows under the new rule, that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy." (A. 25)⁴

The statute limiting federal jurisdiction in diversity cases does not, on its face, limit the "matter in controversy" to the claim of a single litigant.⁵ It is entirely accurate to say that in a class action under amended Rule 23, the "matter in controversy" is the claim or claims of the members of the class as a whole, once the trial court has determined, according to the standards set out in amended Rule 23, that the action should proceed as a class action. The claims of the class, aggregating the total value, and the rights of the members of the class holding the claims, will be finally adjudicated in the single class action and the members of the class bound by the judgment. Therefore, we say, aggregation of claims for purposes of determining the amount in controversy is jus-

4. *Gibbs v. Buck*, 307 U.S. 66.

5. "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, . . ." 28 USCA 1332(a).

tified in class actions under new Rule 23 if it was ever justified, and the concept of allowing aggregation of claims for jurisdictional amount was established before the adoption of either the original or amended Rule 23.

Stated another way: we suggest, as did the Court below, that if there has ever been a question of substantive law in this area, it was whether claims of more than one party could be aggregated for jurisdictional purposes under any circumstances. This question was decided long before it was presented under the procedures established for class action in original Rule 23 or the amendment of that rule.

We submit that the Court of Appeals correctly concluded that the matter in question is one of procedure as opposed to substance. Accordingly, the opinion of the Court of Appeals in this case is simply not subject to the interpretation advanced by petitioner.

II.

The Decision by the Court of Appeals Is the Only Logical and Workable Interpretation of Amended Rule 23.

Decisions have been rendered by two other Courts of Appeals concerning aggregation of claims under amended Rule 23. Those decisions are *Alvarez v. Pan American Life Insurance Co.; et al.*, 375 F.2d 992 (5 Cir.) and *Snyder v. Harris*, 390 F.2d 204 (8 Cir.), 268 F.Supp. 701. Both *Alvarez* and *Snyder* were decided on the basis that the parties were seeking to aggregate claims that were separate and distinct. The respective Courts, without saying as much, first categorized the claims of plaintiffs as "spurious" or "hybird" according to decisions under original Rule 23.

Petitioner at page 6 of its brief, complains that:

"The court below did not attempt to categorize this action under amended Rule 23 nor to characterize its nature for jurisdictional purposes, since it concluded that aggregation of claims of class members is now authorized whenever a class suit is appropriate under the amended rule (App. 25)."

It would appear that petitioner contends that the action should first be classified by the Court under one of the categories established under original Rule 23 as was done in both *Snyder* and *Alvarez*. We submit that a determination of the nature suggested by petitioner and followed in *Alvarez* and *Snyder* is exactly what the Advisory Committee was attempting to avoid by the amendment of Rule 23. The comments of the Advisory Committee concerning Rule 23 at the time it was amended should not be ignored. Indeed, as this Court stated in *Mississippi Publishing Corporation v. Murphree*, 326 U.S. 438 at p. 444:

"The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistence. But in ascertaining their meaning the construction given to them by the Committee is of weight."

The Advisory Committee considered as one of the most serious problems the involvement with original Rule 23 in the categories of "true," "spurious" and "hybrid" class actions and the terms used in connection with each of the categories.⁶ *Advisory Committee's Note*, 39 F.R.D.

6. The terms referred to are "joint, common and undivided," used in connection with "true" class actions, and "several" and "distinct" for "spurious" and "hybrid" class actions. The Committee carefully avoided the use of any of these terms and observed that they had proved to be obscure and uncertain in their application. 39 F.R.D. 69 at p. 98.

69 at pages 98-99. Another serious problem with original Rule 23, as found by the Advisory Committee, was that the "spurious" action was not really a class action at all. Rather, it was an action in which putative members of the "class" could intervene. *Id.* p. 99. In effect, the actions prosecuted under original Rule 23 were both class actions and joinder actions and the reason for the varying rule as to aggregation of claims under original Rule 23 was to some extent logical. Amended Rule 23, on the other hand, contemplates only one form or category of class action in which the court must determine that the action meets all of the standards of the amended rule and, therefore, should be prosecuted as a class action. There can be no logical basis for now allowing aggregation in one class action and refusing it in another.

Booth v. General Dynamics Corp., 264 F.Supp. 465 (N.D. Ill., E.D., 1967), was decided independently on the same theory as the case at bar. The Trial Court wrote:

"The recent amendments to the Federal Rules of Civil Procedure have extinguished the tortured distinction between 'true' and 'spurious' class actions. New standards for determining whether a class action is maintainable were established under the new Rule 23. It is by these new standards, rather than under the outworn authorities cited by the present litigants, that we must determine whether this suit may be maintained as a class action, and consequently, whether the claims of all members of the class may be aggregated to meet the jurisdictional amount."

In framing amended Rule 23, the Advisory Committee undoubtedly considered the problem of aggregation of claims in relation to the new rule. Rule 23(b)(3) sets out certain pertinent factors (A) through (D), which the Court is to consider in determining that a class action is superior to other available methods to litigate the contro-

versy. In relation to these factors, the Advisory Committee has said:

"Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. . . . In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, *or the amounts at stake for individuals may be so small that separate suits would be impracticable.*" (Emphasis added) *Advisory Committee's Note*, 39 F.R.D. 69 at p. 104.

It seems obvious from this language that the Advisory Committee specifically considered members of a class having claims less than \$10,000 in drafting the new rule.

Professor Charles Wright correctly isolated the question presented by the case at bar and suggested the appropriate answer when he wrote:

"The greatest difficulty comes with regard to jurisdictional amount. As a function of the general principle that aggregation is permitted by parties jointly or commonly interested, but not where claims are several and distinct, it was held under the former rule that aggregation of the claims of all members of the class was permitted in 'true' class action, where the rule required a 'joint' or 'common' interest, but not in 'hybrid' or 'spurious' class action. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class

are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversy.' A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached.

"If the Courts continue to apply the ancient learning, it will be necessary to consider in each case, in which the claims of the named representatives are not themselves for more than \$10,000 whether the interests involved are 'joint' or 'common,' an inquiry which is frequently quite difficult and which it was a purpose of the amended rule to avoid. If the interests are joint or common, then the relation of the parties will be such that their action would fall under (b) (1), but it does not follow that all (b) (1) actions will involve joint or common interests." *Barron and Holtzoff's Federal Practice and Procedure*, Vol. 2, 1967 Pocket Part, p. 106.

We would go even further than Professor Wright's suggestion that aggregation of claims of the entire class would be convenient. We contend that without this construction, Rule 23, as amended, is burdened with exactly the problems inherent in the original rule that the Advisory Committee was attempting to eliminate because the distinguishing categories had proved to be obscure and uncertain tests.

Petitioner contends that the Court of Appeals neither mentions nor discusses the problems and implications which arise from its decision. However, the only problem or implication of any serious nature which petitioner mentions is the possibility that the Federal District Courts will be overwhelmed with litigation and Congressional restrictions upon their jurisdiction will be swept aside if the decision of the Court of Appeals is not reversed. A sufficient

answer to that contention is to point out that amended Rule 23 actually has more requirements to be met before a class action can be maintained than were contained in original Rule 23 and the decisions construing it. In addition, the District Court exercises considerable discretion in determining whether the action should be litigated as a class action. Accordingly, federal class action litigation should be more restricted under amended Rule 23 regardless of aggregation. Moreover, if the categories of "true," "spurious" and "hybrid" are to be kept alive and District Courts must first apply the old standards for jurisdictional purposes and then test the action for sufficiency under amended Rule 23, then all of the problems of original Rule 23 will still be with the courts.

This problem is vividly demonstrated in *Lesch v. Chicago & Eastern Illinois Railroad Co.*, 279 F.Supp. 908 (1968). The Court, following *Alvarez*, considered aggregation in light of the categories of the original rule and found that the action in question was "spurious" as opposed to "true." Little or no consideration was given to the requisites of Rule 23 as amended. The case was decided under Rule 23 as if it had never been amended and as if the old categories of "true," "hybrid" and "spurious" were still controlling.

CONCLUSION

Amended Rule 23 should not be burdened with the obscure and uncertain categories which existed under original Rule 23. To do so, would in effect, render the amendment of the rule sterile and useless, as held by both the Court of Appeals and District Court (A. 15, 24). The decision of both of the lower courts is consistent with the provisions of amended Rule 23 and the construction placed upon it by the Advisory Committee; they appear to em-

brace the spirit of interpretation approved by this Court in connection with amended Rule 19 when it said:

"Concluding that the inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the rule was designed to avoid, we reverse." *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102.

This decision does not extend federal jurisdiction contrary to Rule 82, and it does not alter the substantive rights of either party.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 109.

MARGARET E. SNYDER, Also Known as PEG SNYDER,
Petitioner,

VS.

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit.

PLAINTIFF'S PETITION FOR REHEARING.

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for the Eighth Circuit.

PLAINTIFF'S PETITION FOR REHEARING.

Cómes now Petitioner herein, and respectfully petitions the Court for rehearing of the judgment and decision of the Court entered herein on March 25, 1969, and as grounds for this Petition Petitioner respectfully states that:

The "matter in controversy" in ~~this~~ case is the single wrong done by the Respondents to all the shareholders of Missouri Fidelity Union Trust Life Insurance Company as a class, and the procurement of the sum of \$1,200,000 by the Respondents and other directors of the

Company for themselves through such single wrong to the entire class.

The "controlling object" of the suit is to require the Respondent directors to account to the shareholders as a class for the \$1,200,000 they obtained in breach of their fiduciary duties to the class. This right to such accounting is a single one in which all the shareholders have a common and undivided interest.

True, each individual shareholder cannot be awarded more than his aliquot share of the total damages sustained by the class and therefore it is necessary to add together their "separate and distinct" claims to provide the requisite jurisdictional amount. However, it does not follow, at least in the factual circumstances of this case, that the "matter in controversy" does not exceed the sum of \$10,000. Irrespective of the amount of Petitioner's share in the amount for which Respondents are accountable, the "matter in controversy" remains constant at \$1,200,000.

Respondents submit that a decisive consideration should be the fact that the wrong done to the shareholders is not severable as to the individual members of the class, and that such wrong was done to the class as a class. That is to say, the basic "matter" for determination is whether the Respondents wrongfully appropriated to their own use an asset of the value of \$1,200,000 in which the shareholders as a class have a common and undivided interest. Then, and then only, would it become necessary to divide this sum among the individual shareholders. And since the interest of Petitioner and the other shareholders collectively exceed the jurisdictional amount, this should suffice.

To permit aggregation of the several amounts which might be awarded out of the total to the individual members of the class is entirely consistent with the concept of

“matter in controversy” as developed by this Court and illustrated by cases such as **Troy Bank v. Whitehead**, 222 U. S. 39, and **Pinel v. Pinel**, 240 U. S. 594. **Troy Bank** stated the rule in this way:

“When two or more plaintiffs, having separate and distinct demands, **unite for convenience and economy** in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a **single title or right**, in which they have a **common and undivided interest**, it is enough if their interests collectively equal the jurisdictional amount.” 222 U. S. 39, 40 (Emphasis supplied).

Applying that rule in **Troy Bank**, this Court permitted two noteholders, each of whose “separate and distinct” claims was less than the jurisdictional minimum, to aggregate their claims in a suit whose “**controlling object**” was the enforcement of a vendor’s lien which is a “single thing” constituting a “common security” for the payment of both notes.

On the other hand, in **Pinel**, this Court refused to allow aggregation of the claims of two plaintiffs, each of whom sought a child’s share in a decedent’s estate based on the alleged mistake of the testator to make provision for him in the will, because the claim of each plaintiff was truly and in all respects separate and distinct from that of the other plaintiff. As this Court noted, it was “evident that the testator’s failure to provide for one of his¹ children by will, based upon mistake or accident, is independent of the question of whether a like mistake was made with respect to another child” (240 U. S. 594, 596).

Petitioner respectfully submits that whatever principle is desirable and to be applied in cases comparable to **Pinel** when separate and distinct claims involving separate

wrongs to each claimant are sought to be pieced together to make a whole amount for which judgment is prayed, the present case is clearly distinguishable. Here the very starting point, the basic matter in controversy, and the "controlling object" of the suit, involves a single, undivided sum, an initial whole amount, resulting from a single wrong. No individual shareholder can recover unless all can do so, not because of several wrongs to each but because of one wrong done to all. Hence, under the rationale of **Troy Bank**, aggregation of the undivided claims of the shareholders as a class should be allowed.

Respectfully submitted,

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Certificate.

We, Hyman G. Stein and Charles Alan Seigel, counsel for the above named Petitioner, respectfully state and certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

.....
Hyman G. Stein,

.....
Charles Alan Seigel,
Counsel for Petitioner.

ship being alleged as the basis for federal jurisdiction. Since petitioner's allegations showed that she sought for herself only \$8,740 in damages, respondent moved to dismiss on the grounds that the matter in controversy did not exceed \$10,000. Petitioner contended, however, that her claim should be aggregated with those of the other members of her class, approximately 4,000 shareholders of the company stock. If all 4,000 potential claims were aggregated, the amount in controversy would be approximately \$1,200,000. The District Court held that the claims could not thus be aggregated to meet the statutory test of jurisdiction and the Court of Appeals for the Eighth Circuit, following a somewhat similar decision by the Court of Appeals for the Fifth Circuit in *Alvarez v. Pan American Life Insurance Co.*, 375 F. 2d 992, cert. denied, 389 U. S. 827 (1967), affirmed. 390 F. 2d 204 (1967).

In No. 117, Otto R. Coburn, a resident of Kansas, brought suit in the United States District Court for the District of Kansas against the Gas Service Company, a corporation marketing natural gas in Kansas. Jurisdiction was predicated upon diversity of citizenship. The complaint alleged that the Gas Service Company had billed and illegally collected a city franchise tax from Coburn and others living outside city limits. Coburn alleged damages to himself of only \$7.81. Styling his complaint as a class action, however, Coburn sought relief on behalf of approximately 18,000 other Gas Service Company customers living outside of cities. The amount by which other members of the class had been overcharged was, and is, unknown, but the complaint alleged that the aggregation of all these claims would in any event exceed \$10,000. The District Court overruled the Gas Company's motion to dismiss for failure to satisfy the jurisdictional amount and, on interlocutory appeal, the Court of Appeals for the Tenth Circuit

affirmed, holding that because of a 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure relating to class actions, separate and distinct claims brought together in a class action could now be aggregated for the purpose of establishing the jurisdictional amount in diversity cases. 389 F. 2d 831. We granted certiorari to resolve the conflict between the position of the Courts of Appeals for the Fifth and the Eighth Circuits and that of the Courts of Appeals for the Tenth Circuit.

The first congressional grant to district courts to take suits between citizens of different States fixed the requirement for the jurisdictional amount in controversy at \$500.¹ In 1887 this jurisdictional amount was increased to \$2,000;² in 1911 to \$3,000;³ and in 1958 to \$10,000.⁴ The traditional judicial interpretation under all of these statutes has been from the beginning that the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement. Aggregation has been permitted only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. It is contended, however, that the adoption of a 1966 amendment to Rule 23 effectuated a change in this jurisdictional doctrine. Under old Rule 23, class actions were divided into three categories which came to be known as "true," "hybrid," and "spurious." True class actions were those in which the rights of the different class members were common and undivided; in such cases aggregation was permitted. Spurious class actions, on the other hand, were in essence

¹ Section 11 of the Judiciary Act of 1789, 1 Stat. 78.

² Act of March 3, 1877, 24 Stat. 552.

³ Act of March 3, 1911, 36 Stat. 1091.

⁴ Act of July 25, 1958, 72 Stat. 415.

merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact. In such cases aggregation was not permitted: each plaintiff had to show that his individual claim exceeded the jurisdictional amount. The 1966 amendment to Rule 23 replaced the old categories with a functional approach to class actions. The new Rule establishes guidelines for the appropriateness of class actions, makes provision for giving notice to absent members, allows members of the class to remove themselves from the litigation and provides that the judgment will include all members of the class who have not requested exclusion. In No. 117, Gas Service Company, the Court of Appeals for the Tenth Circuit held that these changes in Rule 23 changed the jurisdictional amount doctrine as well. The Court noted that "Because the claims of the individuals constituting the class in the case at bar are neither 'joint' nor 'common' this action under Rule 23 before amendment would not have been classified as a 'true' class action and aggregation would not have been permitted." 389 F. 2d 831, 833. The Court of Appeals held, however, that a different result was compelled now that the amendment to Rule 23 abolished the distinctions between true and spurious class actions. The Court held that because aggregation was permitted in some class actions, it must now be permitted in all class actions under the new Rule. We disagree and conclude, as did the Courts of Appeal for the Fifth and Eighth Circuits, that the adoption of amended Rule 23 did not and could not have brought about this change in the scope of the congressionally enacted grant of jurisdiction to the district courts.

The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon

the categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase "matter in controversy." The interpretation of this phrase as precluding aggregation substantially predates the 1938 Federal Rules of Civil Procedure. In 1911 this Court said in *Troy Bank v. Whitehead* that

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; . . ." 222 U. S. 39, 40.

By 1916 this Court was able to say in *Pinel v. Pinel*, 240 U. S. 594, that it was "settled doctrine" that separate and distinct claims could not be aggregated to meet the required jurisdictional amount. In *Clark v. Paul Gray, Inc.*, 306 U. S. 583 (1939), this doctrine, which had first been declared in cases involving joinder of parties, was applied to class actions under the then recently passed Federal Rules. In that case numerous individuals, partnerships, and corporations joined in bringing a suit challenging the validity of a California statute which exacted fees of \$15 on each automobile driven into the State. Raising the jurisdictional amount question *sua sponte*, this Court held that the claims of the various fee payers could not be aggregated "where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit." 306 U. S. 583, 589. Nothing in the amended Rule 23 changes this doctrine. The class action plaintiffs in the two cases before us argue that since the new Rule will include in the judgment all members of the class who do not ask to be out by a certain date, the "matter in controversy" now encompasses all the claims of the entire class. But it is equally true that where two or more plaintiffs join their claims under the joinder pro-

visions of Rule 20, each and every joined plaintiff is bound by the judgment. And it was in joinder cases of this very kind that the doctrine that distinct claims could not be aggregated was originally enunciated. *Troy Bank v. Whitehead*, 222 U. S. 39 (1911); *Pinel v. Pinel*, 240 U. S. 589 (1916). The fact that judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions is certainly no reason to treat them *differently* from joined actions for purposes of aggregation.

Any change in the Rules that did purport to effect a change in the definition of "matter in controversy" would clearly conflict with the command of Rule 82 that "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts. . . ." In *Sibbach v. Wilson & Co.*, this Court held that the rule-making authority was limited by "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute." 312 U. S. 1, 10 (1941). We have consistently interpreted the jurisdictional statute passed by Congress as not conferring jurisdiction where the required amount in controversy can be reached only by aggregating separate and distinct claims. The interpretation of that statute cannot be changed by a change in the Rules.

For the reasons set out above, we think that it is unmistakably clear that the 1966 changes in Rule 23 did not and could not have changed the interpretation of the statutory phrase "matter in controversy." It is urged, however, that this Court should now overrule its established statutory interpretation and hold that "matter in controversy" encompasses the aggregation of all claims that can be brought together in a single suit, regardless of whether any single plaintiff has a claim that exceeds the required jurisdictional amount. It is argued in behalf of this position that (1) the determina-

tion of whether claims are "separate and distinct" is a troublesome question that breeds uncertainty and needless litigation, and (2) that the inability of parties to aggregate numerous small claims will prevent some important questions from being litigated in federal courts. And both of these factors, it is argued, will tend to undercut the attempt of the Judicial Conference to promulgate efficient and modernized class action procedures. We think that whatever the merit of these contentions, they are not sufficient to justify our abandonment of a judicial interpretation of congressional language that has stood for more than a century and a half.

It is linguistically possible, of course, to interpret the old congressional phrase "matter in controversy" as including all claims that can be joined or brought in a single suit through the class action device. But, beginning with the First Judiciary Act in 1789 Congress has placed a jurisdictional amount requirement on access to the federal courts in certain classes of cases, including diversity actions. The initial requirement was \$500 and a series of increases have, as pointed out above, finally placed the amount at \$10,000. Congress has thus consistently amended the amount in controversy section and re-enacted the "matter in controversy" language without change of its jurisdictional effect against a background of judicial interpretation that has consistently interpreted that congressionally enacted phrase as not encompassing the aggregation of separate and distinct claims. This judicial interpretation has been uniform since at least the 1832 decision of this Court in *Oliver v. Alexander*, 6 Pet. 143. There are no doubt hazards and pitfalls involved in assuming that re-enactment of certain language by Congress always freezes the existing judicial interpretation of the statutes involved. Here, however, the settled judicial interpretation of "amount in controversy" was implicitly taken into account by the

relevant congressional committees in determining, in 1958, the extent to which the jurisdictional amount should be raised. It is quite possible, if not probable, that Congress chose the increase to \$10,000 rather than the proposed increases to \$7,500 or \$15,000 on the basis of workload estimates which clearly relied on the settled doctrine that separate and distinct claims could not be aggregated. Where Congress has consistently re-enacted its prior statutory language for more than a century and a half in the face of a settled interpretation of that language, it is perhaps not entirely realistic to designate the resulting rule a "judge-made formula."

To overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement. That purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction. Any change in the doctrine of aggregation in class action cases under Rule 23 would inescapably have to be applied as well to the liberal joinder provisions of Rule 20 and to the joinder of claims provisions of Rule 18. The result would be to allow aggregation of practically any claims of any parties that for any reason happen to be brought together in a single action. This would seriously undercut the purpose of jurisdictional amount requirement. The expansion of the federal caseload could be most noticeable in class actions brought on the basis of diversity of citizenship. Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse parties are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same state as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. See *Supreme Tribe*

of *Ben-Hur v. Cauble*, 255 U. S. 356 (1921). To allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law. In *Healy v. Ratta*, 292 U. S. 263 (1933), this Court noted that by successively raising the jurisdictional amount, Congress had determined that cases involving lesser amounts should be left to be dealt with by the state courts and said:

"The policy of the statute calls for its strict construction. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." 292 U. S. 263, 270.

Finally, it has been argued that unless the established aggregation principles are overturned, the functional advantages alleged to inhere in the new class action Rule will be undercut by resort to the old forms. But the disadvantageous results are overemphasized, we think, since lower courts have developed largely workable standards for determining when claims are joint and common, and therefore entitled to be aggregated, and when they are separate and distinct and therefore not aggregable. Moreover, while the class action device serves a useful function across the entire range of legal questions, the jurisdictional amount requirement applies almost exclusively to controversies based upon diversity of citizenship. A large part of those matters involving federal questions can be brought, by way of class actions or otherwise, without regard to the amount in controversy. Suits involving issues of state law and brought on the basis of diversity of citizenship can often be most appropriately tried in state court. The underlying claims in the two cases before us, for example, will be determined

exclusively on the basis of Missouri and Kansas law, respectively. In No. 109, a separate suit litigating the underlying issues has already been filed in Missouri state court. In No. 117, the residents of Kansas who contend that certain gas service charges are not authorized by Kansas law can bring a class action under Kansas procedures that are patterned on former Federal Rule 23. There is no compelling reason for this Court to overturn a settled interpretation of an important congressional statute in order to add to the burdens of an already overloaded federal court system. Nor can we overlook the fact that the Congress that permitted the federal rules to go into effect was assured before doing so that none of the rules would either expand or contract the jurisdiction of federal courts. If there is a present need to expand the jurisdiction of those courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.

The judgment in No. 109 is

Affirmed.

The judgment in No. 117 is

Reversed.

on 28 U. S. C. §1331, the general federal question provision, rather than on one of the specific grants of federal jurisdiction.²

The artificial, awkward and unworkable distinctions between "joint," "common," and "several" claims and between "true," "hybrid," and "spurious" class actions which the amendment of Rule 23 sought to terminate is now re-established in federal procedural law. Litigants, lawyers, and federal courts must now continue to be ensnared in their complexities in all cases where one or more of the co-plaintiffs has a claim of less than the jurisdictional amount, usually \$10,000.

It was precisely this morass that the 1966 amendment to Rule 23 sought to avoid. The amendment had as its purpose to give the Federal District Courts wider discretion as to the type of claims that could be joined in litigation. That amendment replaced the meta-

² The majority says broadly, "A large part of those matters involving federal questions can be brought, by way of class actions or otherwise, without regard to the amount in controversy." *Supra*, p. 9. However, in at least one vitally important type of federal question case—an action alleging that governmental action, state or federal, violates constitutional limits—the task of demonstrating the existence of federal jurisdiction would in many instances be significantly complicated if 28 U. S. C. § 1331 were not available. There are, to be sure, a large number of specific statutory provisions conferring on the federal courts jurisdiction to hear certain types of federal question cases. No doubt many constitutional cases could ultimately be brought within one of these special provisions. However, the pitfalls of seeking to establish federal jurisdiction in a constitutional action against public officials without resort to 28 U. S. C. § 1331 are suggested by the diversity of opinions in *Hague v. CIO*, 307 U. S. 496 (1939). Even if 28 U. S. C. § 1343 provides a basis for jurisdiction of such an action against state officials, see *Pierson v. Ray*, 386 U. S. 547 (1967); *Monroe v. Pape*, 365 U. S. 167 (1961), that statute is no help to one challenging purely federal action. *Wheeldin v. Wheeler*, 373 U. S. 647, 650 and n. 2 (1963). See generally Friedenthal, *New Limitations on Federal Jurisdiction*, 11 *Stan. L. Rev.* 213, 216-218 (1959).

physics of conceptual analysis of the "character of the claim sought to be enforced" by a pragmatic, workable definition of when class actions might be maintained, that is, when claims of various claimants might be aggregated in a class action, and it carefully provided procedures and safeguards to avoid unfairness.³

³ The Rule, as amended, reads:

"Rule 23. Class Actions

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or

The amendment was formulated with care by an able committee and recommended to this Court by the Judicial Conference of the United States pursuant to 28

undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

"(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

"(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation

U. S. C. § 331.⁴ It was accepted and promulgated by this Court,⁵ and with congressional acquiescence, became the law of the land on July 1, 1966. 28 U. S. C. § 2072. Now the Court, for reasons which in my opinion will not stand analysis, defeats the purpose of the amendment as applied to cases like those before us here and insists upon a perpetuation of distinctions which the profession had hoped would become only curiosities of the past.

The Court is led to this unfortunate result by its insistence upon regarding the method of computing the amount in controversy as embodied in an Act of Congress, as unaffected by the subsequent amendment of Rule 23, and as immune from judicial re-examination because any change would be an impermissible expansion of the jurisdiction of the courts. None of these premises is correct.

of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966."

⁴ [1965] U. S. Judicial Conf. Proceedings Rep. 52-53. See Kaplan, *supra*, n. 1, at 357-358.

⁵ 383 U. S. 1031 (1966).

I.

Since the first Judiciary Act, Congress has included in certain grants of jurisdiction to the federal courts—notably the grants of jurisdiction based on diversity of citizenship⁶ and the later-established grant of a general jurisdiction to consider cases raising federal questions⁷—a requirement that the “matter in controversy” exceed a stated amount of money. Congress has never expanded or explained the bare words of these successive jurisdictional amount statutes. Over the years the courts themselves have developed a detailed and complex set of rules for determining when the jurisdictional amount requirements are met.⁸

Among these rules is the proposition that multiple parties cannot aggregate their “separate and distinct” claims to reach the jurisdictional amount. *E. g.*, *Troy Bank v. G. A. Whitehead & Co.*, 222 U. S. 39, 40 (1911); *Oliver v. Alexander*, 6 Pet. 143, 147 (1832). Applying that general principle to traditional property law concepts, the courts developed the more specialized rule that multiple parties who asserted very similar legal claims could not aggregate them to make up the jurisdictional amount if their interests, however similar in fact, were in legal theory “several,” *e. g.*, *Pinel v. Pinel*, 240 U. S. 594 (1916), but that such aggregation was permissible

⁶ 28 U. S. C. § 1332.

⁷ 28 U. S. C. § 1331. Other jurisdictional statutes providing a monetary requirement include 28 U. S. C. § 1335 (interpleader); § 1346 (claims against United States); § 1445 (removal of certain actions against carriers).

⁸ See generally 1 J. Moore, *Federal Practice* ¶¶ 0.90-0.99; 1 Barron & Holtzoff § 24; Ilse & Sardell, *The Monetary Minimum in Federal Court Jurisdiction*, 29 St. John's L. Rev. 1 (1954), 183 (1955); Note, *Federal Jurisdictional Amount: Determination of the Matter in Controversy*, 73 Harv. L. Rev. 1369 (1960).

where the parties claimed undivided interests in a single "joint" right. *E. g.*, *Texas & Pac. Ry. v. Gentry*, 163 U. S. 353 (1896); *Shields v. Thomas*, 17 How. 3 (1854).

This general aggregation rule, and its much later application to class actions,⁹ rest entirely on judicial decisions, not on any Act of Congress. There is certainly no reason the specific application of this body of federal decisional law to class actions should be immune from re-evaluation after a fundamental change in the structure of federal class actions has made its continuing application wholly anomalous.¹⁰

The majority rather half-heartedly suggests that this judicial interpretation of the jurisdictional amount statute is not subject to judicial re-evaluation because Congress by re-enacting the jurisdictional amount statutes from time to time has somehow expressed an intent to freeze once and for all the judicial interpretation of the statute. As the majority frankly acknowledges, there are "hazards and pitfalls involved in assuming that re-enactment of certain language by Congress always freezes existing judicial interpretation of the statutes involved."

While re-enactment may sometimes signify adoption, in my view the appropriate position on the matter is that stated in *Girouard v. United States*, 328 U. S. 61, 69-70 (1946):

"It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' It is at best treacherous to find in congressional silence alone

⁹ *Clark v. Paul Gray, Inc.*, 306 U. S. 583 (1939); *Buck v. Gallagher*, 307 U. S. 95 (1939). See *Thomson v. Gaskill*, 315 U. S. 442 (1942).

¹⁰ For a criticism of the aggregation doctrine in another context, see Note, The Federal Jurisdictional Amount Requirement and Joinder of Parties Under the Federal Rules of Civil Procedure, 27 Ind. L. J. 199 (1952).

the adoption of a controlling rule of law. . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases."¹¹

This case, far from being one in which there are "very persuasive circumstances" indicating congressional adoption of prior judicial doctrines, is one where only by the most obvious fiction can congressional re-enactment of a general statute be said to manifest an intention to adopt and perpetuate an existing technical judicial doctrine designed to facilitate administration of the statute.

The hearings and reports on the 1958 statute raising the jurisdictional amount from \$3,000 to \$10,000—which

¹¹ See also *Helvering v. Reynolds*, 313 U. S. 428, 432 (1941); Note, Legislative Adoption of Prior Judicial Construction, The Girouard Case and the Reenactment Rule, 59 Harv. L. Rev. 1277 (1946). In *Francis v. Southern Pac. Co.*, 333 U. S. 445, 450 (1948), the majority noted the difficulty of regarding re-enactment as a congressional adoption of existing judicial doctrines, but decided that "in the setting of this case" adoption was implied. The dissenters responded:

"[I]f judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public." 333 U. S., at 453.

"I venture the suggestion that it would be shocking to members of Congress, even those who are in closest touch with [the kind of legislation involved], to be told that their 'silence' is responsible for application today of a rule which is out of step with the trend of all congressional legislation for more than the past quarter of a century. There are some fields in which congressional committees have such close liaison with agencies in regard to some matters, that it is reasonable to assume an awareness of Congress with relevant judicial and administrative decisions. But I can find no ground for an assumption that Congress has known about the . . . rule [held adopted by re-enactment] and deliberately left it alone because it favored such an archaic doctrine." *Id.*, 465-466.

the majority fastens on as the adopting re-enactment—include not one word about the whole complex body of rules by which courts determine when the amount is at issue, much less any reference to the particular problem of aggregation of claims in class action cases.¹² The majority speculates that it is “possible if not probable” that Congress “implicitly” took into account the existing aggregation doctrines as applied to class action cases when it decided to raise the jurisdiction amount to \$10,000 rather than some higher or lower amount. If we are to attribute to Congress any thoughts on this highly technical and specialized matter, it seems to me far more reasonable to assume that Congress was aware that the courts had been developing the interpretation of the jurisdictional amount requirement in class actions and would continue to do so after the 1958 amendments.

I cannot find any meaningful sense in which the aggregation doctrines in class action cases should be any less subject to re-evaluation in the light of new conditions because Congress in 1958 re-enacted the jurisdictional amount statutes to raise the dollar amount required.

II.

Whatever the pre-1966 status of the aggregation doctrine in class action cases, the amendment of the Rules in that year permits and even requires a re-examination of the application of the doctrine to such cases. The fundamental change in the law of class actions effected by the new Rule 23 requires that prior subsidiary judicial doctrines developed for application to the old Rule be harmonized with the new procedural law. By Act

¹² See Hearing before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. 5 (1957); H. R. Rep. No. 1706, 85th Cong., 2d Sess. (1958); S. Rep. No. 1830, 85th Cong., 2d Sess. (1958).

of Congress, the Rules of Procedure, when promulgated according to the statutorily defined process, have the effect of law and supersede all prior laws in conflict with them. 28 U. S. C. § 2072. Thus, even if the old aggregation doctrines were embodied in statute—as they are not—they could not stand if they conflicted with the new Rule.

Under the pre-1966 version of Rule 23 the very availability of the class action device depended on the “joint” or “common” “character of the right sought to be enforced.”¹³ If the right were merely “several,” only a “spurious” class action could be maintained and only those members of the class who actually appeared as parties were bound by the judgment.¹⁴ It was in this context of a law of class actions already heavily dependent on categorization of interests as “joint” or “several” that the traditional aggregation doctrines were originally applied to class actions under the Federal Rules. In such a context those aggregation doctrines which the majority now perpetuates in the quite different context of the new Rule, whatever their other defects, were at least not anomalous and eccentric.

¹³ A “true” class action could also be maintained to enforce a right “secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it.” Stockholders’ derivative actions were the most significant type of suit within this group. They are now separately dealt with under Rule 23.1 in addition. Under the former Rule 23 (a) (2), if the right was “several” in character, “and the object of the action is the adjudication of claims which do or may affect specific property involved in the action,” a “hybrid” class action could be maintained which would determine the interests of each member of the class in the particular property.

¹⁴ See, e. g., *All Amer. Airways, Inc. v. Eldred*, 209 F. 2d 247 (C. A. 2d Cir. 1954). Thus, under the prior Rule, the “spurious” class action was in effect little more than a permissive joinder device. The pre-amendment categorization and its consequences are explicated in detail in 3A J. Moore, *Federal Practice* ¶¶ 23.08-23.14.

Scholarly and professional criticism of the "character of interest" classification scheme was vigorous and distinguished.¹⁵ Courts as well found the old Rule 23 categories confusing and unhelpful in making practical decisions. Not only was the categorization difficult,¹⁶ but dividing group interests according to whether they were "joint" or "several" did not isolate those cases in which a class action was appropriate from those in which it was not.¹⁷ In proposing amendment of Rule 23, the Advisory Committee summed up experience under the old Rule by saying:

"In practice the terms 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain." 39 F. R. D. 98.

In response to the demonstrated inappropriateness of the "character of interest" categorization, the Rule dealing with class actions was fundamentally amended, effective in July 1966. Under the new Rule the focus shifts from the abstract character of the right asserted to explicit analysis of the suitability of the particular claim to resolution in a class action. The decision that a class action is appropriate is not to be taken lightly;

¹⁵ *E. g.*, Z. Chafee, *Some Problems of Equity* 243-295 (1950); C. Wright, *Federal Courts* 269 (1963); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684 (1941). See Note, *Proposed Rule 23: Class Actions Reclassified*, 51 Va. L. Rev. 629, n. 3 (1965).

¹⁶ A notable example is *Deckert v. Independence Shares Corp.*, 27 F. Supp. 763 (D. C. E. D. Pa.), rev'd, 108 F. 2d 51 (C. A. 3d Cir. 1939), rev'd, 311 U. S. 282 (1940), on remand, 39 F. Supp. 592 (D. C. E. D. Pa.), rev'd *sub nom. Pennsylvania Co. for Insurance on Lives v. Deckert*, 123 F. 2d 979 (C. A. 3d Cir. 1941). The views of successive courts on the proper classification of the *Deckert* action are discussed in Z. Chafee, *supra*, n. 15, at 263-269.

¹⁷ See Fed. Rules Civ. Proc. 23, Advisory Comm. Note, 39 F. R. D. 98-99 (1966).

the district court must consider the full range of relevant factors specified in the Rule. However, whether a claim is, in traditional terms, "joint" or "several" no longer has any necessary relevance to whether a class action is proper. Thus, the amended Rule 23, which in the area of its operation has the effect of statute, states a new method for determining when the common interests of many individuals can be asserted and resolved in a single litigation.

The jurisdictional amount statutes require placing a value on the "matter in controversy" in a civil action. Once it is decided under the new Rule that an action may be maintained as a class action, it is the claim of the whole class and not the individual economic stakes of the separate members of the class which is the "matter in controversy." That this is so is perhaps most clearly indicated by the fact that the judgment in a class action, properly maintained as such, includes all members of the class. Rule 23 (c)(3). This effect of the new Rule in broadening the scope of the "controversy" in a class action to include the combined interests of all the members of the class is illustrated by the facts of No. 117. That class action, if allowed to proceed, would, under the Rule, determine not merely whether the gas company wrongfully collected \$7.81 for taxes from Mr. Coburn. It would also result in a judgment which, subject to the limits of due process,¹⁸ would determine—authoritatively and not merely as a matter of precedent—the status of the taxes collected from the 18,000 other people allegedly in the class Coburn seeks to represent.¹⁹ That being the case, it is hard to understand

¹⁸ See *Hansberry v. Lee*, 311 U. S. 32, 42-43 (1940).

¹⁹ If members of the class elected to exercise the right, which might be extended them under Rule 23 (b)(3), to exclude themselves from the litigation, they would not be included in the judgment in the class action.

why the fact that the alleged claims are, in terms of the old Rule categories, "several" rather than "joint," means that the "matter in controversy" for jurisdictional amount purposes must be regarded as the \$7.81 Mr. Coburn claims instead of the thousands of dollars of alleged overcharges of the whole class, the status of all of which would be determined by the judgment.

In past development of rules concerning the jurisdictional amount requirement, the courts have, properly, responded to changes in the procedural and substantive law.²⁰ Now, confronted by an issue of the meaning of the jurisdictional amount requirement arising in the context of a new procedural law of class actions, we should continue to take account of such changes. We should not allow the judicial interpretation of the jurisdictional amount requirement to become petrified into forms which are of products of, and appropriate to, another time. To do this would vitiate a significant part of the reform intended to be accomplished by the amendment of Rule 23. For the majority result will continue to make determinative of the maintainability of a class action just that obsolete conceptualism the amended Rule sought to make irrelevant. In this sense,

²⁰ For example, the general rule is that if suit is brought only for past installments due under an installment contract, the jurisdictional amount is in controversy only if the installments due at the time of suit exceed the jurisdictional amount. *E. g.*, *New York Life Ins. Co. v. Viglas*, 297 U. S. 672 (1936). However, if, because of the structure of equitable remedies or the availability of a declaratory judgment, the action can put in issue the validity of the contract as a whole, the "matter in controversy" is not the accrued damages, but the potential value of full performance. *Landers Frary & Clark v. Vischer Prods. Co.*, 201 F. 2d 319 (C. A. 7th Cir. 1953); *Franklin Life Ins. Co. v. Johnson*, 157 F. 2d 653 (C. A. 10th Cir. 1946); *Davis v. American Foundry Equip. Co.*, 94 F. 2d 441 (C. A. 7th Cir. 1938). See Note, *Developments in the Law—Declaratory Judgments 1941-1949*, 62 Harv. L. Rev. 787, 801-802 (1949).

continued adherence to the old aggregation doctrines conflicts with the new Rule and is improper under 28 U. S. C. § 2702.

III.

Permitting aggregation in class action cases does not involve any violation of the principle, expressed in Rule 82 and inherent in the whole procedure for the promulgation and amendment of the Federal Rules, that the courts cannot by rule expand their own jurisdictions. While the Rules cannot change subject-matter jurisdiction, changes in the forms and practices of the federal courts through changes in the Rules frequently and necessarily will affect the occasions on which subject matter jurisdiction is exercised, because they will in some cases make a difference in what cases the federal courts will hear and who will be authoritatively bound by the judgment.²¹ For example, the development of the law of joinder and ancillary jurisdiction under the Federal Rules has influenced the "jurisdiction" of the federal courts in this broader sense.²² Indeed, the promulgation of the old Rule 23 provided a new means for resolving in a single federal litigation, based on the diversity jurisdiction, the claims of all members of a class, even though some in the class were not of diverse citizenship from parties on the other side.²³ Similarly, the

²¹ See *Mississippi Publ. Corp. v. Murphree*, 326 U. S. 438, 445-446 (1946); Kaplan, *supra*, n. 1, 399-400. Cf. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U. S. 102, 116-125 (1968).

²² See C. Wright, *Federal Courts* 19-20 (1963); Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F. R. D. 27, 28 (1964).

²³ It has long been established that if the requisite diversity existed between the original parties federal jurisdiction is not ousted merely because later intervenors or members of the class represented by the original parties are citizens of the same State as an adverse party. *Stewart v. Dunham*, 115 U. S. 61 (1885); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356 (1921). The original Rule 23

creation in a Rule having the effect of a statute of a new type of class action—one meeting the requirements of the new Rule as to suitability for class-wide resolution, although involving “several” interests of the members of the class—has changed the procedural context in which the subject matter jurisdiction statutes, like those referring to jurisdictional amount, are to be applied. Making judicial rules for calculating jurisdictional amount responsive to the new structure of class actions is not an extension of the jurisdiction of the federal courts, but a recognition that the procedural framework in which the courts operate has been changed by a provision having the effect of law.

In a larger sense as well, abandonment of the old aggregation rules for class actions would fulfill rather than contradict the command that courts adhere to the jurisdictional boundaries established by Congress. In a large number of instances, Congress has said that cases raising claims with a certain subject matter may be heard in federal courts regardless of the amount involved. However, it has also provided generally that in the two great areas of Article III jurisdiction—federal questions and diversity of citizenship—any suit, regardless of specific subject matter, may be heard if “the matter in controversy exceeds the sum or value of \$10,000.” Just as it would be wrong for the courts to exercise a jurisdiction not properly theirs, so it would be wrong for the courts to refuse to exercise a part of the jurisdiction granted them because of a view that Congress erred in granting it.

provided new occasions for the assertion of this principle, with respect to both “true” class actions, *Montgomery Ward & Co. v. Langer*, 168 F. 2d 182 (C. A. 8th Cir. 1948), and those merely “spurious,” *Amen v. Black*, 234 F. 2d 12 (C. A. 10th Cir. 1956), dismissed as moot, 355 U. S. 600 (1958).

The new Rule 23, by redefining the law of class actions, has, with the effect of statute, provided for a decision by the district courts that the nominally separate and legally "several" claims of individuals may be so much alike that they can be tried all at once, as if there were just one claim, in a single proceeding in which most members of the class asserting the claim will not be personally present at all. When that determination has been made, in accordance with the painstaking demands of Rule 23, there is authorized to be brought in the federal courts a single litigation, in which, both practically and in legal theory, the thing at stake, the "matter in controversy," is the total, combined, aggregated claim of the whole class. When that happens the courts do not obey, but violate, the jurisdictional statutes if they continue to impose an ancient and artificial judicial doctrine to fragment what is in every other respect a single claim, which the courts are commanded to stand ready to hear.

For these reasons, I would measure the value of the "matter in controversy" in a class action found otherwise proper under the amended Rule 23 by the monetary value of the claim of the whole class.